

COURT OF COMMON PLEAS

BUTLER COUNTY, OHIO

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CINDY CARPENTER
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STATE OF OHIO,

Plaintiff,

CASE NO. CR83-12-0614

HONORABLE ANDREW NASTOFF

vs.

VON CLARK DAVIS,

Defendant.

MOTION HEARING

TRANSCRIPT OF PROCEEDINGS

August 28, 2008

JILL M. CUTTER, RPR
(513) 785-6596

267

IMAGED

1 APPEARANCES:

2
3 On behalf of the plaintiff:

4 MICHAEL OSTER, ESQ.
5 DAN EICHEL, ESQ.
6 Assistant Prosecuting Attorneys
315 High Street, 11th Floor
Hamilton, Ohio 45011

7 On behalf of the defendant:

8 MELYNDA COOK-REICH, ESQ.
9 1501 First Avenue
Middletown, Ohio

10 RANDALL PORTER, ESQ.
11 Office of the Ohio Public Defender
250 East Broad Street, Suite 1400
12 Columbus, Ohio 43215
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JILL M. CUTTER, RPR
(513) 785-6596

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TRANSCRIPT OF PROCEEDINGSThursday, August 28, 2008

* * * * *

THE COURT: We're back on record in State of Ohio vs. Von Clark Davis, CR83-12-0614. Again for the record, Von Clark Davis appears in person with counsel Randall Porter, Melynda Cook-Reich. And on behalf of the State of Ohio their assistant prosecutors Dan Eichel and Mike Oster appear as well. Good morning to you counsel and Mr. Davis.

10:05AM

We left off yesterday, it was my understanding that there were witnesses that had been subpoenaed for today's date in anticipation that we wouldn't get to it yesterday regarding the memorandum concerning Mr. Davis' right to a jury trial with respect to resentencing and also on the motion to preclude the State from seeking the death penalty, which is pleading L and M if I remember correctly. So it's my understanding we are going to proceed on those matters.

I will also note for the record that I did receive the supplemental authority in regard to pleading P, which attaches the Cooey vs. Strickland decision and then I will acknowledge receipt of a notice of filing of exhibits in support of motion O. I have not had an opportunity to look at it yet. It was just handed to

10:05AM

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1 me, but I have received it and I will obviously review
2 it prior to rendering a decision on that issue.

3 MR. PORTER: And those two pleadings, I think they
4 were promises of things I told the Court I would file
5 yesterday, so they are more cleaning up of yesterday's
6 record. And I have one other issue if we could clean
7 up the record from yesterday.

8 THE COURT: Sure.

9 MR. PORTER: And I know the Court doesn't want to
10 revisit the motion to suppress issue. I was fumbling
11 through my papers for the citation yesterday to a 6th
12 Circuit case. I was unable to locate it despite my
13 fumbling for a lengthy period of time. The reason I
14 couldn't find it was because it was on my desk at home
15 or desk at the office. The citation I wanted to give
16 the Court was Westside Mothers vs. -- I'm going to
17 spell it because I am not good with pronunciation --
18 O-L-S-Z-E-W-S-K-I, 454 Fed 3rd, 532 pinpoint site 539,
19 6th Circuit, 2006. Yesterday if the Court may remember
20 -- I understand the Court has a million cases -- is I
21 was trying to reference how the 6th Circuit would read
22 the 6th Circuit's own law with respect to what issue
23 the mandate would pertain to and what issues the
24 mandate would not pertain to, whether the opinion would
25 pertain to, and the 6th Circuit case that I just cited

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10:06AM

10:07AM

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1 the Court to address that issue.

2 THE COURT: Do you have a copy of that case for
3 the Court?

4 MR. PORTER: I do not, Your Honor. I could
5 provide the Court one.

6 THE COURT: If you don't have one ready, we can
7 get our own copy of it. That pertains to the issue
8 that you suggest that that would provide additional
9 support for the idea that you could be addressing the
10 suppression of the pretrial identification and trial
11 identification on the guilt phase of the original trial
12 during this remand for -- during this remand?

10:08AM

13 MR. PORTER: And I'm not trying to mince words
14 with the Court or to phrase it slightly different that
15 we could address the Fifth Amendment motion to suppress
16 issue with respect to the degree that testimony would
17 come in with regard to the mitigation phase.

18 THE COURT: All right. Thank you, Mr. Porter.
19 Mr. Eichel?

20 MR. EICHEL: Just another housekeeping matter,
21 just to add to the number of cases on your desk, I am
22 sure -- I have two copies given to opposing counsel
23 this morning, two copies -- or a copy of two cases.
24 One is Sanistaj vs. Burt, which is cited in the Davis
25 vs. Coyle majority decision, the copy I think might be

10:08AM

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1 instructive today on issue L, as well as a case I found
2 this morning that discusses State vs. McGee, a Court of
3 Appeals decision, which was cited in as well as Davis
4 vs. Coyle and that case is State vs. Martin out of the
5 12th District.

6 THE COURT: Thank you. I have read the McGee
7 decision, but I don't think I have seen that one. All
8 right. With those housekeeping matters having been
9 tended to, are we ready to proceed at this time with --
10 which motion do you wish to address first, L or N?

11 MR. PORTER: They were filed as separate pleadings
12 and I will explain that to the Court later on. The
13 testimony will really, I think, go to the first motion,
14 although it could overlap to the second. We are ready
15 to proceed.

16 THE COURT: The first motion meaning the one with
17 regard to a jury trial with respect to resentencing?

18 MR. PORTER: Yes.

19 THE COURT: All right.

20 MR. PORTER: If the Court had no objection since
21 we have witnesses subpoenaed if we could do this
22 testimony prior to providing argument on the motions.
23 would that be acceptable, Your Honor?

24 THE COURT: That would be my preference.

25 MR. EICHEL: Without belaboring the point for the

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1 same reasons we objected to testimony on the motions
2 yesterday, same basis, we think the State's position as
3 a matter of law it need not concern any testimony, no
4 matter what testimony is -- testimony is
5 inconsequential to the outcome of these motions as a
6 matter of law.

7 THE COURT: And it may very well end up being the
8 case. However, I just think it is prudent at this
9 point in time to allow the testimony to be presented,
10 if nothing else to be considered again as a proffer for
11 subsequent review perhaps to be considered
12 substantively if the Court were to disagree with your
13 analysis.

14 However, I do understand your position is that
15 under res judicata and the law of the case, since the
16 issue with regard to the jury waiver has been litigated
17 and been affirmed on appeal, that I do not have the
18 authority to reconsider that because I don't have the
19 authority essentially to overrule a higher court in
20 layman's terms, so to speak.

21 MR. EICHEL: We are all on the same page.

22 THE COURT: I understand that is your position and
23 I understand the argument, but I think that the -- I
24 just think it is a more prudent course at this point in
25 time to allow the testimony to be presented to give the

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1 record eyes as to what it is that they are offering,
2 and then also, you know, to potentially consider it in
3 the event that I should find merit to their motion.

4 MR. EICHEL: Fair enough.

5 MR. PORTER: I want to make one quick response.
6 The Court, and I know you understand this and please, I
7 don't want to belabor a point, but the higher court in
8 this case is the 6th Circuit.

9 THE COURT: Well, there are several. I am pretty
10 low on the overall rung here.

11 MR. PORTER: With respect to this case, the higher
12 court is the 6th Circuit. And that is the opinion you
13 are dealing with. And clearly, that Court has said for
14 the trial Court to address the jury waiver issue. I
15 don't know how it could not be more clear.

16 THE COURT: I read Davis vs. Coyle. I read the
17 comments by Judge Daughtrey -- is that how you
18 pronounce it -- indicating, you know, that she felt
19 that it would be an issue on remand and that she was
20 providing some guidance in dicta, as to how it ought to
21 be viewed and I have read that carefully. I read the
22 case that she cited to and I am prepared to hear the
23 arguments and so I understand that.

24 MR. PORTER: Maybe a question from the Court would
25 help me here, and I mean that respectfully, to try to

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1 fully articulate the issues. Given Judge Daughtrey's
2 opinion that it would be an issue on the case that was
3 remanded, I guess I am unclear of how in good faith you
4 could say that is part of my res judicata.

5 THE COURT: I'm not saying that it is. I haven't
6 ruled on the issue. I recognize that that is their
7 argument. That is all. I have not rendered a decision
8 on any of these motions yet. It is my intent to render
9 a written decision in response to all of these motions.
10 I simply indicated that I understand pursuant to their
11 argument it would be error for me, in fact, to consider
12 really the motion. However, I am not going to make a
13 determination on that at this point. And given that I
14 have not made that determination, I think the more
15 prudent course is to hear the testimony.

16 MR. PORTER: I mean, if it is going to be an
17 issue, certainly one of our options is to go back to
18 the 6th Circuit and have them issue an order to that
19 effect.

20 THE COURT: I'm not going to tell you what you
21 need to do or not do. You have to make your own
22 decisions in that regard. I can tell you I read Davis
23 vs. Coyle and I can tell you that it is on remand for
24 resentencing, but I also read where they -- the Judge
25 elected to provide guidance on issues that really

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1 weren't before the Court at that point in time. I also
2 read the concurring opinion of the other judge that did
3 not look favorably upon Judge Daughtrey's doing so and
4 I have considered all of that, and all of it is
5 something that I will take into consideration. All I
6 am saying, is you have witnesses here. Call your
7 witness.

8 MR. PORTER: With that, Your Honor, we would call
9 Mr. Davis. Mr. Davis will not be testifying as to the
10 facts of the case, so he would be reserving his Fifth
11 Amendment right. He will be testifying regarding
12 conversations he had with his attorney regarding his
13 jury waiver.

10:15AM

14 We understand to the extent that he testifies to
15 those conversations, it is a waiver of the privilege,
16 but only to that extent. Call Mr. Davis.

17 THE COURT: Mr. Davis.

18 VON CLARK DAVIS

19 Having been first duly sworn, was examined and testified under
20 oath as follows:

10:16AM

21 DIRECT EXAMINATION

22 BY MR. PORTER:

23 Q. State your name for the record.

24 A. Von Clark Davis.

25 Q. And is Clark your middle name --

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1 A. Yes, it is.

2 Q. -- just for clarification of the record?

3 A. Yes, it is.

4 Q. And Von Clark Davis, the normal -- the way you
5 spell it is the normal way people spell it?

6 A. Yes, it is.

7 Q. And your current address?

8 A. Ohio State Penitentiary, Youngstown, Ohio.

9 Q. And are you the defendant in this case?

10 A. Yes, I am.

10:17AM

11 Q. And I'm going to start by asking you some
12 background information. First is, do you have a nickname
13 persons call you by?

14 A. Red.

15 Q. And how old are you, Red?

16 A. Sixty-one.

17 Q. And prior to being incarcerated, how far did you
18 go in school?

19 A. GED.

20 Q. And since you have been incarcerated, have you
21 obtained any additional education?

10:17AM

22 A. Yes.

23 Q. And could you tell the Judge what that additional
24 education is?

25 A. Associate's degree in liberal studies and a

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1 year-and-a-half of personnel management.

2 Q. Did you, in obtaining your Associate's degree, did
3 you have any courses in constitutional law or a related area?

4 A. No, I didn't.

5 Q. Are -- I'm going to use the term jail house
6 lawyer. Could you tell me what your understanding of that
7 term is?

8 A. It's basically considered inmates helping other
9 inmates with their law work, their cases.

10 THE COURT: I have heard the term before.

10:18AM

11 Q. Have you served as a jail house lawyer to other
12 individuals?

13 A. No.

14 Q. Have you, in fact, offered some suggestions to
15 Melynda and I with respect to how to litigate your case?

16 A. No, I haven't.

17 Q. Have you forwarded suggestions from other people?

18 A. Yes, I have.

19 Q. And were those suggestions formulated by you?

20 A. Yes.

10:18AM

21 Q. Were they form -- did you come up with those
22 suggestions?

23 A. No, I did not.

24 Q. I want to move ahead to the present case now.
25 When you were charged in this matter, were you able to retain

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1 counsel?

2 A. Yes.

3 Q. You hired the attorneys that represented you?

4 A. They were appointed to me.

5 Q. And could you identify for the Judge who those
6 attorneys were?

7 A. Mr. Jack Garretson and Mr. Michael Shanks.

8 Q. And could you describe briefly your relationship
9 with those attorneys?

10 A. It was very good.

10:19AM

11 Q. Did you have faith in those attorneys?

12 A. Absolute faith.

13 Q. And did you trust -- to what degree -- I'm sorry,
14 I am leading, Your Honor -- to what degree did you trust the
15 advice those attorneys gave you?

16 A. Well, I should point out here that I had the
17 utmost confidence in Mr. Shanks and Mr. Garretson. I relied
18 totally on their advice and their direction. I felt
19 comfortable the way they was handling the case, and I accepted
20 that. I thought they were for my best interests. They showed
21 that, displayed that, from the very beginning.

10:20AM

22 Q. At some point did it become an issue whether you
23 should waive your right to a jury trial or not?

24 A. Yes, it did.

25 Q. And who raised that issue with you?

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1 A. My attorneys.

2 Q. And your attorneys being?

3 A. Mr. Garretson and Mr. Shanks.

4 Q. And prior to them raising that issue, what did you
5 think you were going to do for purposes of your trial?

6 A. My knowledge at the time was it would be a jury
7 trial. I was unaware that a three-judge panel existed at that
8 time.

9 Q. Did, at some point, you make a decision to waive
10 your right to a jury trial?

10:21AM

11 A. Yes, I did.

12 Q. Prior to reaching that decision, did the attorneys
13 make any promises to you?

14 A. There was never any promises.

15 Q. And did you, in fact, waive your right to a jury
16 trial?

17 A. Yes, I did.

18 MR. PORTER: Court's permission to approach
19 the witness for purposes of showing him Defendant's
20 Exhibit C, Your Honor?

10:22AM

21 THE COURT: Permission granted.

22 Q. Would you please look at Defendant's Exhibit C?

23 A. (Witness complies with request.)

24 Q. Are you able to identify that?

25 A. Yes.

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1 Q. And could you tell the Judge what that Exhibit C
2 is?

3 MR. PORTER: Your Honor, I have a copy. Would the
4 Court like a copy?

5 THE COURT: That would be helpful.

6 MR. PORTER: I should have offered you the
7 exhibits yesterday, I'm sorry.

8 THE COURT: No apologies necessary. I have
9 actually seen this. It is attached to one of the
10 motions as an exhibit.

10:22AM

11 MR. PORTER: It is. I didn't know if you had it
12 available, Your Honor.

13 Q. (By Mr. Porter) Could you please identify
14 Defendant's Exhibit C for the record and for the court
15 reporter?

16 A. This is a jury waiver.

17 Q. And whose jury waiver is that?

18 A. Mine.

19 Q. And whose name appears on that?

20 A. My name is signed here.

10:23AM

21 Q. And can you tell the Judge why you signed that?

22 A. I signed it because I felt it was the best advice
23 given by my attorneys and I felt comfortable doing so. I saw
24 no reason to question or challenge my own decision making at
25 the time. They were, again, to my best interests and I took

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1 | their advice and signed the waiver.

2 | Q. And did you, in fact, appear in court and tell the
3 | judges that you waived your right to a jury trial?

4 | A. Yes, I did.

5 | Q. Can you remember actually appearing there?

6 | A. Yes.

7 | Q. And did you tell the Judges you waive or Judge you
8 | waive your right to a jury trial?

9 | A. Yes, I did.

10 | Q. And why did you do that?

10:23AM

11 | A. It was -- again, I felt it was the best advice
12 | from my attorneys and that is why I signed it.

13 | MR. PORTER: Could I have an opportunity to confer
14 | with counsel for a minute, Your Honor, please?

15 | THE COURT: Yes.

16 | (Counsel defers with co-counsel off the record.)

17 | MR. PORTER: Your Honor, we have no further
18 | questions. Thank you for the opportunity.

19 | THE COURT: Mr. Eichel, do you have questions?

20 | MR. EICHEL: No questions at this time.

10:24AM

21 | THE COURT: Mr. Davis, you can return to your seat
22 | at counsel table.

23 | THE DEFENDANT: Thank you.

24 | MS. COOK-REICH: Call Mike Shanks.

25 |

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1 MICHAEL SHANKS

2 Having been first duly sworn, was examined and testified under
3 oath as follows:

4 DIRECT EXAMINATION

5 BY MS. COOK-REICH:

6 Q. For the record, can you state your name, please?

7 A. My name is Michael Shanks.

8 Q. And your address?

9 A. My business address is 110 North Third Street,
10 Hamilton, Ohio.

10:25AM

11 THE COURT: Can you speak a little bit louder?

12 Q. You were trial attorney for Von Clark Davis, also
13 known as Red?

14 A. Along with Jack Garretson, that is correct.

15 Q. You were the initial attorneys on that for both
16 the 1983 and 84 case, as well as 1989 when it was sent back
17 for resentencing; is that correct?

18 A. That's correct.

19 Q. Ultimately in 1984 the case was tried before a
20 three-judge panel?

10:25AM

21 A. Yes, it was.

22 Q. At the time that the case was originally before
23 the trial court, can you relate to the Court the persons that
24 comprised your defense team?

25 A. Jack Garretson and I, my secretary. I believe Tim

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1 Evans was also helping us out and I believe that was it.

2 Q. Other than yourself and Mr. Garretson, were there
3 any other attorneys, private investigators, social workers,
4 mitigation specialists, psychologists appointed or assigned to
5 assist you and Mr. Garretson in Von Clark Davis' defense?

6 A. Not directly to assist us. I believe Dr. Roger
7 Fisher was a psychologist and was appointed by the Court, but
8 I don't think he was appointed or given to us as an expert for
9 our purposes.

10 Q. When the case came back to the Court in 1989, at
11 that time did you have any additional assistance such as a
12 mitigation specialist, social worker, an investigator,
13 psychologist to assist in Von Clark Davis' defense?

10:27AM

14 A. If my recollection is correct, I believe we asked
15 for an additional psychologist or psychological review and I
16 believe that was turned down.

17 Q. Okay.

18 A. So the answer is, other than that, I don't think
19 we had any other assistance.

20 Q. Mr. Shanks, you have had an opportunity to review
21 the American Bar Association's Guidelines for the Appointment
22 and Performance of Counsel at Death Penalty Cases as of 2003?

10:27AM

23 A. I did.

24 Q. Okay. And specifically are you familiar with
25 Guideline 4.1?

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1 MR. EICHEL: Your Honor, this appears to be way
2 beyond the scope of the jury waiver issue before the
3 Court.

4 THE COURT: All right.

5 MR. EICHEL: If it is before the Court.

6 MS. COOK-REICH: It goes to the information and
7 knowledge he had in order to provide that advice.

8 THE COURT: This is as of 2003, and you are asking
9 him about advice he gave in 1983 or '84?

10 MS. COOK-REICH: Yes, sir. There are several
11 cases from the United States Supreme Court in the 6th
12 Circuit that specifically indicate that the 2003 ABA
13 Guidelines are to be applied to cases back from the
14 1980s, specifically --

10:28AM

15 THE COURT: But even if that is the case, I mean,
16 obviously in 1984, he did not have knowledge of rules
17 that had not come out for 20 years.

18 MS. COOK-REICH: Absolutely. I can provide you a
19 line of cases that indicate even cases in the 1980s are
20 governed by the 2003 ABA Guidelines.

10:28AM

21 THE COURT: I mean, I am going to overrule the
22 objection. I am going to allow her to ask the
23 question. I am assuming you will --

24 MS. COOK-REICH: I will wrap it up, clear it up.

25 THE COURT: Clear it up, right.

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1 THE WITNESS: I'm not familiar with it by section
2 number. I am familiar with the basic guidelines.

3 Q. (By Ms. Cook-Reich) Okay. And would it be fair
4 to say that obviously in 1984 you didn't have any knowledge of
5 2003 ABA Guidelines?

6 A. That's true.

7 Q. In regards to the ABA Guidelines relative to what
8 should comprise of a defense team in a death penalty case, did
9 you familiarize yourself with that?

10 A. Yes.

10:29AM

11 Q. would you agree, Mr. Shanks, that at the time of
12 your representation of Mr. Davis and at the time of advice
13 given to him as to the waiver of a jury trial in 1984, that
14 you did not have the requisite team as the ABA Guidelines set
15 forth? Meaning you didn't have a defense investigator, you
16 didn't have a social worker, you didn't have a mitigation
17 specialist, you didn't have a psychologist specifically
18 assigned to assist you in determining the life issues that
19 your client might have faced to explain the offense?

20 A. That's correct. I believe the guidelines say at a
21 minimum that would be the team and we had none of those
22 experts.

10:29AM

23 Q. Okay. And would it also be fair that in 1989 when
24 the resentencing came back, you didn't have that?

25 A. That's correct.

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1 Q. Okay. And in regards to the information that an
2 -- let me back up. If you didn't have an investigator, who
3 did you use or what did you use as your investigative
4 services?

5 A. For the most part Mr. Garretson and I spoke to
6 family members. I knew most of his family, if not all of his
7 family, spoke to them personally. Witnesses. I am not --
8 it's conceivable that the law office I had, Holbrock & Jonson
9 -- at the time Tim Evans was an attorney. He may have gone
10 out with me a couple of times just because he might have been 10:30AM
11 interested in the case, but I know that Mr. Garretson and I
12 did the bulk of the investigation.

13 Q. Would you say that given the lack of additional
14 assistance of that defense team, we will just call them the
15 other people that you didn't have, that you relied upon what
16 you and Mr. Garretson could discover as attorneys?

17 A. By default, that is correct.

18 Q. To your knowledge, do yourself or Mr. Garretson
19 have any expert training in psychology?

20 A. No, but over the course of years of practicing 10:31AM
21 criminal law you become familiar with it. I am not trained as
22 a psychologist in any way, shape or form.

23 Q. A neurologist?

24 A. Certainly not that.

25 Q. Okay. Social worker?

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1 A. Far from that.

2 Q. would you have -- strike that. If you had been
3 given information by a psychologist or a neurologist that your
4 client suffered from possible brain impairment, would that
5 have impacted upon your advice and opinion as to a jury
6 waiver?

7 A. The answer is I believe it would have, because all
8 cases -- the decision to -- for trial strategy to take one
9 trial strategy or another, or the decision to waive a jury or
10 not, decision to go three-judge panel in a death penalty case,
11 these are extremely serious decisions and these are the types
12 of things that you lay awake at night thinking about the right
13 or wrong judgment.

10:32AM

14 I happened to know Mr. Davis personally, before
15 his involvement in this case and was aware that he took a
16 rigid -- what I perceived to be kind of a rigid attitude to
17 his defense, which I couldn't really understand knowing his
18 personality to be something different from that. And honestly
19 I believe that if I had the advantage of a trained
20 psychologist that would have been more specialized to look
21 into these background issues, which would help to explain the
22 attitude that he was presenting to us in the defense of his
23 case, it may have impacted on the way we handled the jury
24 waiver or the way we dealt with him on the issue of the jury
25 waiver.

10:33AM

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1 Q. Would you agree, Mr. Shanks, that a decision made
2 without all of the facts, such as potential brain impairment,
3 is a decision that is not well informed?

4 A. A decision made with all of the facts sometimes is
5 difficult, but a decision made without all of the facts is
6 certainly deficient most of the time.

7 Q. At the time that you advised Mr. Davis to waive --
8 let me back up. You did provide advice to Mr. Davis as to the
9 waiver of the jury trial?

10 A. That is -- Mr. Garretson and I together, over a
11 long time ultimately it resulted in advice being given to him
12 to take the case to a three-judge panel.

10:33AM

13 Q. And you are familiar with the Exhibit C, which was
14 previously admitted and it might still be in front of you?

15 A. Well, I am certainly familiar with it. In all
16 honesty, I didn't remember it particularly, but I am familiar
17 with it.

18 Q. I will show you what is marked as Defendant's
19 Exhibit C. Do you recognize your signature on that document?

20 A. I do.

10:34AM

21 Q. And that is the jury waiver that was executed
22 prior to proceeding in open court?

23 A. That's correct, and even though I don't have
24 direct recollection of the specific document, it is my
25 signature and I do believe this one was filed in this case.

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1 Q. At the time that you signed that or advised Mr.
2 Davis relative to the right to a jury trial and his waiver of
3 that jury trial right, you didn't have the expert assistance
4 of a psychologist?

5 A. That's correct.

6 Q. If you had a social history of Mr. Davis,
7 indicating a multi-generational history of children born out
8 of wedlock, parental abandonment, children raised without
9 fathers or father figures, infidelity, divorce, alcoholism,
10 violent tempers on the part of women in the family, physically
11 abusive behavior and illegal activities and incarceration, not
12 just with Mr. Davis, but a multi-generational history of that,
13 would that have impacted upon your advice given to Mr. Davis
14 as to a waiver of a jury trial?

10:35AM

15 A. It would have and I think in this case even more
16 specifically it would have been important because the history
17 I have had of Mr. Davis was really directly related to my
18 personal knowledge of his family. And it was limited to my
19 prior experience with him plus interviews with his friends and
20 family that Mr. Garretson and I had done. And as I sit here
21 right now, I don't believe we developed any of those issues
22 that later turned out to have some impact on Mr. Davis'
23 personality.

10:35AM

24 Q. Would it also have impacted your advice and
25 opinion as to the ripeness of a jury waiver if you had known

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1 about his dysfunctional nuclear family although you knew some
2 of his family you didn't know the extent of his full family?

3 A. Knowing how defense in capital cases have evolved
4 and the experience that I have later obtained and with the
5 benefit of capital death penalty seminars, it would have had
6 an impact because it would have impacted the mitigation that
7 we would have been able to present to a jury which may have
8 been more substantial, should have been more substantial if we
9 would have had the investigators and all of the experts that
10 now are common in capital cases.

10:36AM

11 Q. Mr. Shanks, in a prior affidavit and I believe the
12 post-conviction litigation, you indicated that your waiver of
13 the jury trial and advice to Mr. Davis was rested mainly, and
14 you used the word "mainly", on the trial court's failure to
15 sever the weapons under disability charge. If you had had the
16 information relative to brain impairment, the
17 multi-generational history of problems in his family and the
18 dysfunctional nature of his family, would that "mainly" word
19 change?

20 A. It may have, because it would have given us an
21 explanation for some of his conduct that we weren't able to
22 explain away in a satisfactory way. I was concerned, I am
23 sure Mr. Garretson was concerned, about the effect of his
24 prior weapons issues and weapons involved in this case, and in
25 dealing with juries, we felt that that was a very negative

10:37AM

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1 circumstance that we didn't have ammunition to deal with to
2 balance out, you know, we think in an appropriate manner. So
3 it may have impacted our decisions and our thought processes
4 because at that point in time that was the most critical
5 aspect or one of the most critical aspects in our decision to
6 recommend a jury waiver.

7 MS. COOK-REICH: Okay. May I have one second,
8 please?

9 THE COURT: You may.

10 MS. COOK-REICH: I have no further questions for
11 Mr. Shanks.

12 THE COURT: Okay. Mr. Eichel?

13 CROSS-EXAMINATION

14 BY MR. EICHEL:

15 Q. Good morning, Mr. Shanks.

16 A. Mr. Eichel.

17 Q. You and I know each other for a long time?

18 A. Fortunately we have known each other.

19 Unfortunately, it's a long time, that's correct.

20 Q. Okay. Class of 1976 UC law school, you are a
21 graduate with honors?

22 A. Thank you very much.

23 Q. I graduated, not necessarily --

24 A. You are blowing my cover here, Dan.

25 Q. Back in 1983, the Common Pleas Court of Butler

10:38AM

10:38AM

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1 County consisted of three general division judges; is that
2 correct?

3 A. I believe so.

4 Q. That is Judge Moser, Judge Stitzinger and Judge
5 Brewer who was presiding over this case?

6 A. Right.

7 Q. And Judge Brewer had a plethora of pretrial
8 motions filed by you and Mr. Garretson?

9 A. Yes.

10 Q. And one of those was the motion to sever Count
11 Two, the trial of Count Two from the trial of Count One, which
12 Judge Brewer denied?

10:39AM

13 A. Right.

14 Q. And it has already been brought out, your main
15 reason -- mainly was the word you used in that affidavit --
16 was because the severance was denied, therefore you wouldn't
17 be able to keep that evidence from the jury, so you waived a
18 jury trial; is that correct?

19 A. Yes. That was a trial strategy issue that we all
20 considered. It was a concern for us for sure.

10:40AM

21 Q. Okay. In fact, Mr. Evans, who handled the case on
22 appeal, you were aware of what was -- what was eventually
23 raised on appeal, the primary issue was about the severance;
24 is that not right?

25 A. Yes, you know, I am relying on my memory now, but

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1 I believe that is correct. I wasn't involved in the actual
2 appeal. Mr. Evans did it. But I do think that that was the
3 focus.

4 Q. Mr. Evans was solo on every appeal he ever did
5 really. Well, on this one. Let's not talk about other cases.
6 And you testified today you knew Mr. Davis personally?

7 A. I did.

8 Q. You consulted with him on this case from virtually
9 the moment he was first in the Butler County jail?

10 A. Actually, I think before he was in the Butler
11 County jail.

10:40AM

12 Q. When he came into the Butler County jail, he
13 already had told police you were his attorney?

14 A. Yes, I believe I actually talked to him or at
15 least talked to his family before he turned himself in.

16 Q. Okay. And you gladly took this case?

17 A. Honestly, sadly would be the thing, because I
18 thought a lot of him and as everybody who knew him was
19 extremely saddened by the allegations and felt bad for him to
20 be in the circumstance, but I took the case willingly.

10:41AM

21 Q. Yeah. You weren't reluctant to take the case at
22 all?

23 A. No.

24 Q. You spent a lot of hours on this case?

25 A. Yes.

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1 Q. You were court appointed. I'm sure the documents
2 filed in this case for you to be paid reflected a lot of
3 hours?

4 A. They don't reflect all of the hours because there
5 was a \$2,500 limit and you get to that pretty quickly.

6 Q. Okay.

7 A. You spend a lot of time.

8 Q. And you also over the years prior to this
9 occurrence were very familiar with Dr. Roger Fisher?

10 A. Yes.

10:42AM

11 Q. And Dr. Fisher is court appointed on hundreds of
12 cases in Butler County. Was a court appointed attorney --
13 well, court appointed evaluator, psychologist?

14 A. It was at the start of his career here, but, yes,
15 he had been involved in the court before and had done
16 evaluations for different -- NGRI's, things like that.

17 Q. It's your recollection today that he was court
18 appointed by the Judge but not on a motion of yours?

19 A. You know what, Dan, I don't really recall. I
20 believe he was court appointed, but he is appointed by the
21 Court but he wasn't given to us in a traditional sense where
22 we had an employer/employee relationship where he had
23 confidential circumstances. It wasn't that type of situation,
24 but we may have had filed a motion. I don't recall right now.

10:42AM

25 Q. Whatever that situation was, the record reflected

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1 that?

2 A. Right.

3 Q. But whether he was court appointed or not, isn't
4 it true that Dr. Fisher always freely discussed these cases
5 with defense counsel, with all counsel?

6 A. Sure. He was available and he was candid in his
7 evaluations and spoke to us, spoke to me. I think the
8 difficulty with Roger Fisher's evaluation is at the time and I
9 remember in one of the motions filed, the psychology expert
10 -- the psychology experts were focused on issues of
11 competency, insanity, and things like that. They had yet to
12 develop the expertise that they are now talking about as far
13 as helping with family issues, social issues, other
14 impairments that might go to mitigation.

10:43AM

15 Roger Fisher was very open with us as far as the
16 evaluations he performed. And I am sure I asked him, although
17 I don't remember specifically everything I asked him, a lot of
18 things that might help us, but I am not sure he was
19 experienced in the type of evaluations that they do now.

20 Q. Well, with that qualification, he may have not at
21 the time psychology -- maybe clinical psychology at the time
22 wasn't up with what it is today with mitigation?

10:44AM

23 A. It is evolved for sure.

24 Q. At that time, though, he was very astute in issues
25 of competency to stand trial, insanity at the time of the

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1 offense, present competency to assist you, counsel, in his own
2 defense?

3 A. He was, yes. He was competent to make those
4 evaluations for sure.

5 Q. And he did so on many, many occasions?

6 A. Right, not just this one.

7 Q. And you did discuss this case with Dr. Fisher?

8 A. Many times.

9 Q. And Dr. Fisher, in fact, was called at one stage
10 or another of this case I believe?

10:44AM

11 A. He was called.

12 Q. Do you recall his testimony, and for the record
13 this is, counsel, information on page 404 of the transcript of
14 testimony. The defendant is now free of disease or defect.
15 Do you recall?

16 A. I recall that the substance of his evaluation was
17 he was free of disease or defect. Do I remember him saying
18 that specifically? No, but I believe that was his opinion.

19 Q. Also page 403 the transcript of testimony,
20 defendant was free of mental disease or defect that would have
21 impaired his capacity to appreciate the criminality of any
22 conduct which he engaged or had conformed his conduct to the
23 requirements of the law?

10:45AM

24 A. I am aware that that was the substance of his
25 testimony; that is correct.

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1 Q. And basically he said he was -- had explosive
2 psychiatric disorder and problems relating with women?

3 A. I think it was an isolated explosive disorder. I
4 am not sure what the phraseology was, but yes, explosive
5 psychiatric disorder and I know that he indicated that he had
6 a problem in dealing with women.

7 Q. But free of mental disease or defect were the
8 lynch pins of his decision?

9 A. I do not dispute what you read because that would
10 be an accurate verbatim statement.

10:46AM

11 Q. In consulting with him before he testified, you
12 knew -- you freely discussed what he meant in regard to his
13 evaluation of what he saw in Mr. Davis?

14 A. Yeah, that is true. Really more than that; what
15 he meant and how it could help us and how we could relate that
16 issues that would help either in his defense or mitigation.
17 It was more than just what he meant by that, because that is a
18 pretty cold diagnosis. You are not insane at the time and the
19 defense of insanity, you know, there was an issue about
20 diminished capacity back then, which was focused on whether or
21 not that was allowed to be used in trial. I dealt with him in
22 anything which we thought might be helpful.

10:47AM

23 My concern now for Mr. Davis is that I am not sure
24 Roger was able to identify things that we might have been able
25 to use later on for mitigation.

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1 Q. In mitigation?

2 A. Right.

3 Q. Such as dysfunctional family issues?

4 A. The things that she said. The things that have
5 evolved to be focus issues on mitigation.

6 Q. I see. All right. Did he ever give any
7 indication to you that there was a problem with his competency
8 to stand trial?

9 A. No.

10 Q. And that was a major issue at the time as far as
11 criminal cases in general, you would have asked those
12 questions?

10:47AM

13 A. Yes.

14 Q. And he did not indicate anything of the sort that
15 he was not competent?

16 A. No. And I didn't have any indication from my
17 experience that he was incompetent to stand trial.

18 Q. And your focus personally with yourself and Mr.
19 Davis you had no indication?

20 A. No.

10:48AM

21 MR. EICHEL: Okay. No further questions, Your
22 Honor.

23 MS. COOK-REICH: I just have a couple of clean-up
24 questions.

25 THE COURT: That's fine.

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REDIRECT EXAMINATION

BY MS. COOK-REICH:

Q. Mr. Shanks, would you agree that -- I want to make sure I am hearing you right. Dr. Fisher's role in his psychological evaluation was to assist on the issue of potential not guilty by reason of insanity as a plea, to assist in regards to whether the client was competent and to assist as to potentially an issue of diminished capacity?

A. The answer to the best of my recollection is that is correct and that would be because those were the issues that psychologists traditionally testified to in that time frame. And as a defense lawyer, and as I answered Mr. Eichel, I did try to speak with him to see if there was anything else that might be helpful, but those were the traditional concerns that he did the evaluation for. If I recall, the tests that he performed were those tests that were used to determine those basic issues, competency...

10:49AM

Q. And those things would go to the issue of guilt, not mitigation?

A. More specifically to guilt than mitigation for sure.

10:49AM

Q. You're aware that the 2003 ABA Guidelines indicate that the psychologist is to be an integral part of the team assisting at all steps and certainly at the mitigation phase of a case?

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1 A. I am aware that that is what --

2 Q. To help develop a social history, help develop or
3 find an explanation for a client's actions?

4 A. The role of psychologist now is something separate
5 from what Roger Fisher performed for the Court on that date,
6 that is correct.

7 MS. COOK-REICH: No further questions.

8 THE COURT: Any further?

9 MR. EICHEL: No.

10 THE COURT: All right. Mr. Shanks, thank you for
11 your testimony and you are excused.

10:50AM

12 MS. COOK-REICH: Your Honor, can we go off the
13 record for a minute?

14 (Defense counsel confers with defendant off the
15 record.)

16 MS. COOK-REICH: Thank you, Your Honor.

17 THE COURT: You have had a moment to confer with
18 counsel and with your client?

19 MS. COOK-REICH: Yes, Your Honor.

20 THE COURT: Are you ready to proceed?

10:52AM

21 MS. COOK-REICH: That would be the end of our
22 witness testimony in this case, and we have identified
23 C today, and yesterday we identified A and B. We would
24 like to submit them into the record for the Court. I
25 know you have seen C. I don't think we provided you a

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1 copy of A and B yesterday.

2 THE COURT: And that would be fine. Are you
3 saying that your testimony is complete with regard to
4 all motions?

5 MS. COOK-REICH: Yes, Your Honor.

6 THE COURT: All right. Any objection to me
7 accepting these exhibits into evidence for purposes of
8 this hearing?

9 MR. EICHEL: No, Your Honor.

10 THE COURT: All right.

10:52AM

11 MS. COOK-REICH: I will give them to Joe.

12 THE COURT: And it is A, B and C?

13 MS. COOK-REICH: Yesterday when we finished I left
14 A and B up on the podium here and I took them home with
15 me.

16 THE COURT: Those have now been admitted into
17 evidence. Is there any evidence or testimony that the
18 State wishes to offer?

19 MR. EICHEL: We need to proffer nothing, Your
20 Honor.

10:53AM

21 THE COURT: All right. Let me know when you are
22 ready or are prepared to argue.

23 MS. COOK-REICH: We are going to split the factual
24 and the legal argument. I will do the factual. Mr.
25 Porter will do the legal argument.

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1 You have heard the testimony of both Mr. Davis and
2 Mr. Shanks today relative to the information that both
3 counsel had available to them and the information that
4 Mr. Davis had available to him when he made the waiver
5 of the jury trial. And we would submit to the Court
6 that under the 2003 ABA standards, given the deficiency
7 in the information counsel had available to them to
8 provide the proper advice, that the waiver should be
9 taken away at this time and Mr. Davis should be allowed
10 to have a jury trial relative to mitigation.

10:54AM

11 I would like to first address, although I am going
12 to get into legal argument, the issue that we kind of
13 started on in regards to why the 2003 ABA Guidelines
14 should apply. And I will give you the case cites to
15 them specifically. VanHook, which it is Van Hook vs.
16 Anderson, V-A-N-H-O-O-K. A decision from August 4,
17 2008 from the 6th Circuit. I don't have the F 3D cite
18 yet. The Westlaw cite is 2008, 29 52 109. And in that
19 particular case the ABA Guidelines from 2003 are
20 addressed relative to the issue of counsel's advice and
21 performance and investigation and they indicate that
22 the 2003 guidelines are applicable even though cases
23 and the facts of the case occurred previously and then
24 there is a line of cases out of the 6th Circuit on the
25 similar vein. One would be Hamblin, H-A-M-B-L-I-N, vs.

10:54AM

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1 Mitchell. Case cite 354, F 3D 462. Specifically at
2 page 487. And in that particular case, the Court
3 indicated that the 2003 ABA Guidelines simply explain
4 in greater detail than the 1989 guidelines, the
5 obligations of counsel and that those guidelines do not
6 depart in principle or context from Strickland,
7 Wiggins, or other 6th Circuit decisions concerning
8 obligations of counsel.

9 Specifically, in the Hamblin case, that was a 1982
10 trial of an aggravated murder case. So they are
11 applying the 2003 standards even back to a 1982 case.
12 Additionally, in Dickerson vs. Bagley, case cite 453 F
13 3D 690, at page 694 also a 6th Circuit decision out of
14 2006 also applying the 2003 standards from the ABA
15 Guidelines from an aggravated murder trial from 1985.

16 And additionally, Rompilla vs. Beard,
17 R-O-M-P-I-L-L-A, 2005 125 Supreme Court 2456 and that
18 is a 1988 murder trial in which the Court in 2005, the
19 United States Supreme Court applied the 1989 and 2003
20 ABA Guidelines to counsel's performance, investigation
21 and obligations.

22 THE COURT: So I am clear, your argument is that
23 due to these proposed deficiencies in the advice, that
24 the jury waiver was not knowing, intelligent and
25 voluntary as to sentencing, but it was as to guilt?

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1 MS. COOK-REICH: We tried to stay away from guilt
2 because you --

3 THE COURT: I'm just trying to figure out what
4 your argument is.

5 MS. COOK-REICH: Factually, I focused only on
6 mitigation and I did so with Mr. Shanks because the
7 Court has directed in Davis v. Coyle as directed that
8 this is not a resentencing and I am trying to limit
9 what we did. I simply put on Mr. Shanks as to the
10 impact of additional information, if it would have
11 impacted his advice had he had both the assistance back
12 in those years and the information, how would that have
13 impacted his advice to his client and his decision as
14 to how to proceed on the mitigation trial. If you
15 would like additional information as to how it would
16 have impacted the guilt, I can certainly go forward on
17 that, but I didn't want to open that --

10:57AM

18 THE COURT: I was just trying to figure out what
19 your argument was and you were tailoring the
20 argument --

10:57AM

21 MS. COOK-REICH: I am tailoring the argument to
22 the mitigation phase because that is what we are
23 particularly here on. At the time that Mr. Shanks and
24 Mr. Garretson represented Mr. Davis, they were without
25 the assistance other than themselves. They had no

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1 social worker to gather social history. They didn't
2 have mitigation specialists. They didn't have a
3 regular investigator to conduct interviews of witnesses
4 and they certainly didn't have a psychologist that was
5 assigned to them to help them put it all together. And
6 as Mr. Shanks put it, specifically, the role of Dr.
7 Fisher at the time was to do an NGRI, competency and a
8 little bit of diminished capacity and he stuck with the
9 guilt phase of the trial. He didn't assist with the
10 mitigation phase which is what the 2003 ABA Guidelines
11 cover and I can point the Court to that specifically.

10:58AM

12 THE COURT: And the only thing -- I don't know for
13 sure because again, I haven't read the transcript, but
14 just from my review of kind of the appellate history of
15 the case, in Davis vs. Bagley, which was the case out
16 of the District Court, there are references in that
17 case to the fact that he was appointed after the guilt
18 phase prior to mitigation pursuant to the statutes that
19 allow the Court to order a PSI, and allow them to
20 appoint for purposes of mitigation. That was the
21 impression that I had from the discussion in that case.
22 And let me see if I can find it specifically. Again,
23 you have an advantage over me at this point in terms of
24 being more familiar with the transcript of the
25 proceedings. I'm just asking what the facts are, not

10:59AM

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1 legal argument.

2 MS. COOK-REICH: My factual memory of --

3 THE COURT: There was an issue in that case, it
4 says, "Petitioner also urges the Court to alter or
5 amend its judgment because the psychologist presented
6 by defense counsel during petitioner's mitigation
7 hearing was not actually a defense expert witness.
8 Specifically petitioner argues that although he
9 initially requested the appointment of Dr. Roger Fisher
10 as his defense psychologist pursuant ORC 2929.024,
11 subsequent actions by the prosecution in the trial
12 court resulted in the appointment of Dr. Fisher not as
13 a defense expert pursuant to 2029.024, but as an expert
14 pursuant to 2929.03(D)(1), who is obligated to report
15 his findings to the prosecution and the trial court?
16 And so, I guess just from a factual standpoint, it
17 appears that he was appointed and specifically
18 2929.03(D)(1) provides when death may be imposed as a
19 penalty the Court upon the request of the defendant
20 shall require a pre-sentence investigation to be made
21 and upon request of the defendant shall require a
22 mental examination to be made and shall require reports
23 of the investigation. And if a mental examination,
24 copies of any reports prepared should be furnished to
25 the Court, the trial jury if the offender was tried by

11:00AM

11:00AM

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1 a jury, to the prosecutor, and to the offender or the
2 offender's counsel.

3 so just from a factual standpoint I wasn't sure
4 that what you were stating was accurate because it
5 seems like -- at least the record that was in front of
6 that District Court would indicate that he was
7 appointed at the mitigation or for purposes of
8 mitigation, but obviously not pursuant to 2929.024,
9 which is what would occur today.

10 MS. COOK-REICH: I am relying upon my memory of
11 the history, but I was only 12 when this particular
12 case was coming through and what I have read what Mr.
13 Shanks has advised as to what Dr. Fisher's role was at
14 the time. I think that your statement reading that
15 particular case that Dr. Fisher was more of the Court
16 expert rather than the defense expert as in comport
17 with Mr. Shanks has testified to, and is completely
18 opposite of what the 2003 ABA Guidelines provide. And
19 specifically, I would point to the Court to guideline
20 4.1, which is the defense team's supporting services as
21 well as 10.7, which is the investigation guideline and
22 10.11, defense case concerning penalty. And those
23 guidelines including the commentaries all speak of the
24 psychologist. I am going to focus on him because that
25 is the only one expert that existed, but the

11:01AM

11:02AM

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1 psychologist is supposed to be a team member, the
2 defense team member and supposed to have the ability
3 to --

4 THE COURT: Similar to the experts that I have
5 appointed in this case to assist Mr. Davis in his
6 resentencing, correct?

7 MS. COOK-REICH: Yes, but the role of those
8 particular experts pursuant to the ABA Guidelines is
9 that they are not a Court's witness, Your Honor, but
10 instead they are part of the defense team with the
11 privileges that are associated with that; someone to
12 talk with, have him evaluated to determine if there is
13 a family history that needs to be gone into, obtain and
14 review -- I apologize. A mitigation specialist would
15 obtain but a psychologist would review any relevant
16 records, social workers, Naval history, family history,
17 the history that we spoke of that were in prior
18 affidavits from this case relative to potential brain
19 disorders. Those things that are important in what Mr.
20 Shanks says that he was without at the time of
21 providing the advice to Mr. Davis and although Mr.
22 Garretson is not here, I relate to the Court that Mr.
23 Shanks said that he and Mr. Garretson spoke about this
24 case at all times and that Mr. Shanks didn't have that
25 advice. Mr. Garretson wasn't a psychologist or

11:02AM

11:03AM

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1 neurologist or social worker either. And I apologize
2 for not bringing that to Mr. Shanks' attention, but he
3 indicated they didn't have those extra degrees. But
4 our argument is that at the time, they didn't have the
5 expert services which would have assisted them to
6 uncover the mitigation evidence that was necessary to
7 provide an explanation for the offense which is what
8 the role and goal of mitigation and mitigation hearing
9 is. You are past the guilt phase. You are past
10 explaining I did or I didn't do this. You are in the
11 phase of what explains the client's behavior and as Mr.
12 Shanks said he didn't have that. He had none of that.
13 Yes, he knew Mr. Davis and Mr. Davis' family because
14 they lived in Hamilton, but he certainly didn't have
15 the information relative to the multi-generational
16 issues that Mr. Davis had in his past and I believe Mr.
17 Shanks testified that all of those things would have
18 impacted on his advice relative to waiving the jury
19 trial. And most significantly brain impairment would
20 have provided that connection why is Red here? And I
21 think Mr. Eichel asked him about his first involvement
22 with the case, and Mr. Shanks said, you know, we were
23 saddened to hear because I was a friend of the family.
24 Such advice and expert assistance would have impacted
25 as Mr. Shanks said his advice to his client. And Mr.

11:04AM

11:04AM

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1 Davis testified that he relied on his attorney's
2 advice. He has the utmost respect for Mr. Shanks and
3 Mr. Garretson and would have taken their advice. Mr.
4 Davis, likewise, is not a neurologist or a
5 psychologist, not a social worker to provide the
6 multi-generational history and the social history that
7 is necessary in mitigation cases. What I am trying to
8 say is that the information and advice that an attorney
9 provides to their client is only as good as the
10 information that attorney has. And without that, that
11 is not a knowing, intelligent waiver of the right to a
12 jury trial.

11:05AM

13 THE COURT: All right.

14 MS. COOK-REICH: Mr. Randall Porter will discuss
15 the legal issues.

16 THE COURT: This is still on L?

17 MS. COOK-REICH: Yes, I focused on L.

18 MR. PORTER: And based upon the Court's questions
19 if I could jump in on my partner's and add to this,
20 though I am sort of getting into the factual issues.

11:06AM

21 I don't have a cite, but it is Glen, G-L-E-N-N,
22 vs. Tate. It was the first Ohio case to reach 6th
23 Circuit. It was out of Mahoney County. Counsel in
24 that case elected to proceed with the appointment of an
25 expert pursuant to 2929.03 as opposed to 2929.024 and

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1 the 6th Circuit found that counsel was ineffective for
2 doing so. The second and I don't have the citation off
3 the top of my head and I apologize to the Court. I
4 should have been prepared for this issue. I'm sorry.
5 I do have the Glenn vs. Tate cite now thanks to
6 counsel. 71 Fed 3rd 1204 6th Circuit, 1995. The
7 second fact that the Court raised and I will go on to
8 the legal issues, is that the Court cited from the
9 record that counsel had waited 'til between guilt and
10 mitigation or trial phase and sentencing phase to ask
11 for the appointment of mitigation. I will submit
12 additional authority on that, Your Honor. There is a
13 plethora of 6th Circuit case law that says if you are
14 waiting to prepare your sentencing phase in a capital
15 case after the trial phase, then you are pretty much
16 per se ineffective.

11:07AM

17 THE COURT: I don't know that that happened. I am
18 indicating that based on my experience in the capital
19 cases that I have handled that that 2929.03(D)(1) issue
20 doesn't occur or doesn't arise until after a finding of
21 guilt and prior to proceeding into the mitigation
22 phase. And my experience now, of course, defense
23 counsel almost always declines to have their client
24 participate in either a PSI or that mental examination,
25 but I -- that is why I made that comment. There is

11:07AM

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1 nothing in Davis vs. Bagley that tells me precisely
2 when the request happened or anything like that. I
3 didn't mean to side track you with that issue.

4 MR. PORTER: And I think there is some -- in
5 counsel's citing of the case I think real insightful is
6 the Van Hook case that Melynda cited you to. It
7 occurred during the same time frame the Court talks
8 about the difficulties and counsel being ineffective
9 for retaining someone from the court clinic and
10 secondly for not having a mitigation investigator and
11 again this was a 1983 case. I am not standing up here
12 -- I am supposed to talk about the legal issues. What
13 I tried to do preparing last night is to move through
14 the State's argument and I think I just have five
15 points I want to respond to.

11:08AM

16 The first is and it's probably error on my part,
17 is the way we have let the issue become framed. And we
18 have let the issue become framed of one of should Red
19 get to withdraw his jury waiver? And I am the one that
20 framed it. And I am thinking back I should have framed
21 it differently. It should have been framed as, does
22 this Court have the power to reconstitute a three-judge
23 panel? The prosecution --

11:09AM

24 THE COURT: That kind of moves us into the other
25 motion, though, doesn't it?

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1 MR. PORTER: It does, but I am responding -- and I
2 agree with the Court wholeheartedly. The prosecution
3 addressed both issues, both responses. I am not being
4 very articulate. All I was going to say is maybe I
5 focused the issue wrong. And if, in fact, the Court
6 finds that 2929.06 is constitutionally infirm at that
7 point I think the Court doesn't have the power to
8 reconvene the panel. There is no other basis for the
9 Court to do that. Secondly --

10 THE COURT: But that is a distinct legal issue I
11 think from whether he would be entitled to have a jury
12 either whether you want to characterize it as the right
13 to withdraw his previous jury waiver and ask for a jury
14 to participate in the resentencing in this case, or
15 simply whether he has the ability to request a jury at
16 this point despite his waiver, that is separate and
17 distinct I think from the analysis of whether 2929.06
18 applies retroactively.

11:10AM

19 MR. PORTER: And I want to think about the Court's
20 question for a minute. And if my answer is not
21 responsive, please ask me to clarify. I think it is a
22 distinct issue, but --

11:11AM

23 THE COURT: Ramifications are very similar, but it
24 is a distinct issue. I understand.

25 MR. PORTER: It is a distinct issue, but if you

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1 can't reconvene and reconvene may be the wrong word
2 there. If you can't reconvene the panel, then whether
3 he can withdraw his jury waiver becomes somewhat moot.

4 THE COURT: Yes, I agree.

5 MR. PORTER: The second issue, is the Ring issue.
6 Back when this case was tried in 1983, Red didn't have
7 a 6th Amendment constitutional right to a jury for
8 purposes of sentencing. The scope of the 6th Amendment
9 has changed dramatically for purposes of capital
10 litigation. We cited the Court to Ring vs. Arizona. 11:12AM
11 And this day where the U.S. Supreme Court is
12 constricting the bill of rights --

13 THE COURT: I guess a question -- not to take you
14 off track again -- but in 1983, just as today, he did
15 have the right in a capital case to have the jury -- to
16 have a jury both as to guilt and as to sentencing.

17 MR. PORTER: He had a statutory right. He did not
18 have a constitutional right. That is the distinction.

19 THE COURT: Okay.

20 MR. PORTER: The prosecution cites the Court to 11:13AM
21 the Ohio Supreme Court case in Ketterer. Ketterer is
22 distinguishable -- and I don't disagree with what they
23 cite in the holding report. They cite to -- that a
24 defendant can waive his 6th Amendment right as
25 interpreted by Ring. I agree wholeheartedly with that,

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1 but if you look at the facts as they layout, Ring was
2 decided June 24, 2002. Mr. Ketterer committed his
3 crime, I have it in my notes on February 24th, 2003.
4 Hence that constitutional right or the constitution as
5 we understand it now, existed at the time Mr. Ketterer
6 made his waiver. That didn't exist in this case.

7 Third is the prosecution argues that what Red is
8 attempting to do today is to withdraw his jury waiver
9 in the middle of the trial. What we have basically had
10 is I think we said it's either 24 or 25-year break in
11 this.

11:14AM

12 THE COURT: Coming up on 25.

13 MR. PORTER: And the prosecution in their
14 pleadings has cited to part of the 6th Circuit holding,
15 but I think it is important to look at the sentence
16 after the fact, that the prosecution has repeatedly
17 cited to as we -- I am quoting now -- we note that
18 under Ohio Revised Code 2945.05 a waiver of jury trial
19 may be withdrawn by the defendant at any time before
20 the commencement of trial. Here is what the
21 prosecution cites: Granted the resentencing hearing
22 that we order today will not constitute a trial in the
23 sense that the petitioner's guilt or innocence is again
24 at issue. But I think it is important that the Court
25 -- and I know the Court is familiar with the opinion.

11:15AM

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1 Please, I don't mean to insult the Court's
2 intelligence.

3 THE COURT: I don't take insult easily, so feel
4 free to make your argument.

5 MR. PORTER: The next sentence I think is real
6 important, which the 6th Circuit goes on, however, in
7 this case, the proceeding can indeed be considered a
8 functional equivalent of a trial because unlike
9 sentencing in a non-capital case it will take the form
10 of an evidentiary proceeding on the question whether 11:16AM
11 Davis should receive the death penalty or some form of
12 a life sentence. So Red would respectfully disagree
13 with the prosecutor's characterization that we have
14 just taken a 24 or 25-year break in the proceedings and
15 here we are again. And I don't mean to throw the
16 Court's words back at him, but we have had this
17 argument in the past in this case and the Court I think
18 used the term he is here on a de novo proceeding. And
19 I would at least like to suggest that we are really
20 here on a new day, a new trial for purposes of these 11:16AM
21 proceedings.

22 The fourth issue and we have heatedly debated this
23 morning already, I am not going to go there again, is
24 what effect the 6th Circuit decision has with respect
25 to res judicata and law of the case. Cite the Court to

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1 Davis vs. Coyle, 475 781. Again, I know the Court is
2 familiar with the case. And I also think and the Court
3 cited Givens concurring opinion this morning.

4 THE COURT: I indicated that I have read that. I
5 read the opinion from soup to nuts.

6 MR. PORTER: I think it is interesting how she
7 interprets the majority opinion that it is, in fact,
8 giving this Court guidance as to what issues can be
9 reopened or not reopened and this was one of those
10 issues. Just as Givens goes on to talk about after
11 concluding, the case must be resentenced I would
12 refrain from expressing any opinion as to the other now
13 moot issues raised by Davis. In particular, I would
14 avoid suggesting to the Ohio courts an approach to the
15 jury waiver issue as the majority opinion does after
16 concluding there is no basis from federal relief. And
17 I think she is at least acknowledging there that, in
18 fact, that is what majority has done here. They said
19 this is an open issue when it comes back to this Court.

11:17AM

20 Those are my responses. I thank the Court for
21 listening.

11:18AM

22 THE COURT: Thank you. Mr. Eichel, will you be
23 arguing for the State?

24 MR. EICHEL: Yes, Your Honor, thank you.

25 THE COURT: If I neglected to do so, I think I

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1 said it yesterday, but I will make it clear again,
2 prior to the hearing today, prior to argument either by
3 Ms. Cook-Reich, Mr. Porter or yourself, I did and have
4 fully reviewed the motions and the responses that have
5 been provided in writing. I just want the record to be
6 clear that I have done that.

7 MR. EICHEL: Thank you, Your Honor. It was my
8 intention today to approach this as I would an
9 appellate argument knowing that in the appellate court
10 as in this court everything has already been read and
11 considered. You want further oral argument on what we
12 think of the other side's argument I think.

11:19AM

13 THE COURT: Fair enough.

14 MR. EICHEL: We have heard a lot about what the
15 6th Circuit said and I would point out clearly it is
16 dicta. It is not a part of the remand. Not a part of
17 the order of the Court. And that being said, I don't
18 ask the Court to totally disregard it, but I ask the
19 Court to look at what that majority -- those two judges
20 of the majority did say and take it at face value.

11:20AM

21 First of all, they did not consider or cite or say
22 anything about the impact of the Ohio resentencing
23 statute that is the motion M, the actual motion M.
24 2929.06(B) expressly requires that if you had a
25 conviction after a three-judge panel's decision and

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1 resentencing is ordered by any federal or state court,
2 that resentencing shall be done by a three-judge panel.
3 Davis vs. Coyle didn't consider the fact that Ohio has
4 a statute that provides a procedure here.

5 Secondly, they consider only one Ohio case when
6 they try to discern what the Ohio law will be on
7 retrial. They only cite 2945.05, which expressly
8 states you don't have a withdrawal of a jury waiver
9 after the commencement of trial. And they cite one
10 case Court of Appeals decision State vs. McGee, which
11 in that case, it did involve a new trial on remand
12 reversal on the conviction. McGee was reversed by the
13 Ohio Supreme Court because of defective indictment. It
14 was remanded for a whole new trial. The prosecutor
15 even went to the point of amending the indictment to
16 fix it, to fix the error that caused the reversal then
17 you start from an arraignment. According to the Court
18 of Appeals you proceed anew from arraignment of the
19 amendment indictment to a new trial. So you inherently
20 revoke -- and that makes sense. It makes inherent
21 sense because you are starting a commencement of the
22 trial. We are not doing that in this case.

23 McGee, that Court of Appeals decision, was
24 considered and distinguished by Judge valen in 2004 in
25 State vs. Martin and on that very ground. In that

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1 case, there was a trial during the course of the trial
2 the McGee error was discovered there was a missing
3 element. The prosecutor in the trial amended the
4 indictment. The trial proceeded, and then the case was
5 reopened later. Judge Valen said there was -- the
6 reopening didn't trigger the right to have a new jury.
7 This is distinguished from State vs. McGee.

8 Look at Davis vs. Coyle again. They cite two
9 federal court decisions about waiver of jury trial does
10 not bar a demand for a jury on a retrial of the same
11 case. United States vs. Groth and United States vs.
12 Lee, they cite a third case Sinistaj vs. Burt another
13 6th Circuit case. It says the rule in Groth is
14 inapplicable when no event such as the reversal and
15 remand for a new trial intervenes between the waiver
16 and attempted withdraw. Sinistaj vs. Burt is exactly
17 like what Judge Valen says McGee should be
18 distinguished. I'm not sure I said that phrase
19 correctly, but --

20 THE COURT: I understood what you were saying.

21 MR. EICHEL: It also -- because there is no event
22 that intervened between the waiver and the attempted
23 withdraw, in that such as a remand for new trial, that
24 doesn't contemplate a new waiver, a new jury waiver
25 having been necessary.

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1 Mr. Porter argued today -- I wrote down four
2 issues. I missed the fifth one I guess. The first
3 thing, most important thing that he mentioned first was
4 he should rephrase the memorandum. In fact, if you
5 look at L, it is not captioned motion. It is captioned
6 memorandum. But he should rephrase his issue, does
7 this Court have the power to reconvene a panel? I
8 submit what this memorandum asks the Court is, does
9 this Court have the power to impanel a jury for
10 resentencing?

11:24AM

11 I think that question is answered by State -- the
12 Supreme Court of Ohio in a couple of cases. One is
13 State vs. Mason, vs. Griffin. In matters of criminal
14 sentencing of Ohio is a statutory procedure. Trial
15 court does not have any inherent power to act. It only
16 has such power to act as is provided in the statute or
17 rule. And in that Mason vs. Griffin, Judge Griffin
18 unambiguously lacked jurisdiction to convene a jury
19 sentencing hearing supposed compliance with Blakely and
20 Apprendi.

11:25AM

21 Mr. Porter is asking this Court to convene a jury
22 trial under Ring. That is the same as Apprendi and
23 Blakely. Same legal theory as Apprendi and Blakely.
24 Supreme Court, long standing rule, we do not create
25 procedure out of whole cloth. They said that in 1987

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1 in State vs. Penix. And they cited that type of logic
2 in State vs. Mason, vs. Griffin. Most important, State
3 vs. Ketterer, is a case citing Mason vs. Griffin. And
4 in Ketterer arising out of Butler County, it was asked
5 that the trial judge or three-judge panel take guilty
6 plea and a waiver of jury and then have a bifurcated
7 proceeding where the jury determines the sentence.
8 That is exactly what is being asked for here today.
9 That is exactly what is being asked for. And the
10 Supreme Court says there is no rule. It is not
11 permitted by any statute or rule in Ohio to have a
12 hybrid or bifurcated procedure such as that.

11:26AM

13 If you look at the Ring line of cases, Apprendi,
14 Blakely, Ring, Booker, the Supreme Court has stated in
15 one of those cases, it is Blakely, the Supreme Court
16 majority of that Court said nothing prevents defendant
17 from waiving his Apprendi rights. In this case the
18 defendant waived his 6th Amendment right to a jury
19 trial. He waived it and had a bench trial. Based on
20 that, he had a bench trial under Ohio law, three-judge
21 panel. And under Ohio law as motion L and motion M
22 will determine, that law is if you had a conviction and
23 your conviction is affirmed, you get a resentencing
24 down the road by a three-judge panel if you had a
25 three-judge panel in the first place. It is consistent

11:27AM

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1 with Ketterer. It is consistent with Mason. It is
2 consistent with the law of the case. And I need not
3 reiterate what I said in the memorandum I filed in this
4 case. Thank you.

5 THE COURT: Thank you. Mr. Porter, final word on
6 the matter?

7 MR. PORTER: I just have two very brief responses.

8 THE COURT: And if one of them isn't addressing
9 where I would derive the authority to impanel a jury,
10 please add that as one of the issues that I would like
11 to hear about.

11:28AM

12 MR. PORTER: I think the first question is if you
13 have -- assuming you have either an invalid waiver or
14 for a number of reasons we have set forth, I think at
15 that point I accept the prosecution's argument --

16 THE COURT: You are saying we can't impanel a new
17 jury, that I am just --

18 MR. PORTER: To go by the prosecution's argument
19 you can't impanel a new jury either and at that point
20 you are required to impose a life sentence. In fact --

11:28AM

21 THE COURT: Even though you are seeking -- the
22 memo says memorandum concerning his right to a jury
23 trial with respect to resentencing, you are not really
24 under any scenario expecting or asking that a jury
25 actually be impaneled. You are simply indicating that

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1 if either M -- if the Court would adopt your argument
2 in M that 2929.06 does not apply retroactively, or if I
3 would accept the argument that he should be able to
4 withdraw the previous jury waiver, that that would
5 simply under either scenario eliminate the Court from
6 being able to impanel a new three-judge panel to hear
7 the case, and that we would then be left with the
8 options that existed in the previous version of 2929.06
9 which is to impose the life sentence? More or less?

10 MR. PORTER: More or less. Again, I'm not trying
11 to mince words. Under the prior 2929.06 if that
12 incorporates 2929.03 you could reconstitute the panel
13 if you have the same members available. So given that
14 caveat, and I think at that point, when the Court
15 reaches that decision you are bound by -- again, I am
16 going by analogy if I could -- State vs. Penix,
17 P-E-N-I-X, which I am sure the Court is familiar with.

11:30AM

18 The only other point I want to touch base on, and
19 it seems to be a glaring error in their argument is the
20 prosecutor ended up saying Red waived his 6th Amendment
21 right in 1983. Well, since that was prior to Red, he
22 had no Sixth Amendment right to waive and he couldn't
23 have waived anything that he didn't know about. So
24 those are my two rebuttal points.

11:30AM

25 THE COURT: All right. That matter will be taken

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1 under advisement. And the Court will issue a written
2 decision on that motion simultaneous with the decisions
3 that I will render on the motions that I have taken
4 under advisement yesterday. This leaves pleading M.
5 I'm sorry, Mr. Porter, you have something --

6 MR. PORTER: I'm sorry, Your Honor. You are going
7 there. You are well ahead of me.

8 THE COURT: That leaves pleading M.

9 MR. PORTER: We have made -- or I have made a
10 tactical choice today. I think M speaks for itself. I
11 am not going to reiterate it for the Court. I am going
12 to file additional authority. Earlier we were talking
13 about meeting prevailing standards of practice, and I
14 think I may have missed on this. There is a Common
15 Pleas Court decision out now. It is my understanding
16 they did find 2929.06 is unconstitutional. I will file
17 that with the Court next week.

11:31AM

18 THE COURT: But before you forego any argument and
19 I did read your argument multiple times as I did the
20 State's, and I guess if you would simply address the
21 argument that this is a procedural statute, or remedial
22 and that therefore can be employed retroactively, I
23 understand there is language specifically in the
24 statute that says that it applies retroactively, but
25 then there are the additional arguments as to whether

11:32AM

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1 they can, in fact, do that. And it seems to me to
2 hinge on the issue of whether it is procedure or
3 substantive. Did you have anything further above and
4 beyond what you have already cited that you wish me to
5 consider on that issue?

6 MR. PORTER: I have nothing, Your Honor.

7 THE COURT: All right. Do you have wish to submit
8 on that?

9 MR. EICHEL: Your Honor, I am happy to submit this
10 motion on what I have filed and I would like to point
11 out how familiar I am with this issue. I am counsel of
12 record for the State in State vs. Walls. The case is
13 highly relevant to these issues. And that is why walls
14 -- the case of walls is woven throughout my memorandum
15 on the State issue, state retroactivity issue and the
16 ex post facto issue. My point, just a point of
17 reference, it's kind of odd that in the trial court and
18 the Court of Appeals the federal ex post facto issue
19 wasn't even litigated. It sort of arose in the Supreme
20 Court of Ohio as an additional issue that was thrown in
21 a reply brief of defense counsel.

11:33AM

11:34AM

22 THE COURT: Are you talking about in the walls
23 litigation?

24 MR. EICHEL: Yes, in walls. So I had to relearn
25 the law before oral argument in walls. It was quite

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1 instructive to me to get into the case law on this.

2 My argument in this case is that this case is an
3 even better example of the matter of procedure,
4 remedial law than was Walls. Even better. But it is
5 highly analogous. In Walls we had a choice between
6 juvenile court and Common Pleas Court; what is the
7 form, what is the trial judge to hear this case. This
8 case is nothing more than that, that very same thing
9 whether there are three judges here or three new
10 judges. It's that simple.

11:35AM

11 THE COURT: Okay. Any last words based on that?

12 MR. PORTER: Again, I am trying to do this by
13 analogy. I think it might be instructive -- I don't
14 know quite how to do this, submit an additional one
15 page brief, to look at State vs. Williams. I
16 understand it was a different issue, but it would be
17 interesting to see if they dealt with the remedial
18 issue in that aspect. I think it is Williams which was
19 the Toledo case which they found they didn't have the
20 language. I know the statute has been amended. I'm
21 not going there for that purpose.

11:35AM

22 THE COURT: You are saying to look at the analysis
23 in Williams to see if they had any -- addressed that
24 particular issue?

25 MR. PORTER: The remedial aspect. It's my

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1 recollection and I am going from the cuff and I know
2 the prosecutor is getting ready to a respond. I'm not
3 too sure Williams would prevail under his challenge of
4 2929.06.

5 THE COURT: I will take a look at it.

6 MR. PORTER: If it was, in fact, a remedial
7 statute.

8 THE COURT: I will take a look at it. I don't
9 remember if they addressed that in Williams or not.

10 MR. EICHEL: My recollection is the Williams
11 Supreme Court decision did not address it because it
12 became moot. I don't know what it did in the Court of
13 Appeals. That may be where he is going.

11:36AM

14 MR. PORTER: If I am thinking of the right
15 decision, it didn't moot out. It was the one that
16 declared 2929.06. This issue has been before the Ohio
17 Supreme Court. I need to back up. I don't know where
18 the Court is. This issue was squarely before the
19 court. The Court, two years ago on an ex post facto
20 and also on a statutory challenge --

11:37AM

21 THE COURT: They found the legislature had been
22 silent on whether it was supposed to be retroactively
23 applied and then of legislators went back and put the
24 language in saying it is retroactive. Right. Okay. I
25 am familiar with the case just not chapter and verse

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1 off the top of my head. I will look at it again with
2 your thoughts in mind to see whether there is anything
3 of merit in that.

4 MR. PORTER: We have nothing else to add on this
5 issue other than assuming that the Max White case is on
6 point. We will file the trial court opinion with
7 respect to 2929.06.

8 THE COURT: Just as additional authority?

9 MR. PORTER: Yes.

10 THE COURT: All right. This will also be taken
11 under advisement. By my count, it appears that we have
12 addressed all of the pending motions. They are all
13 under advisement at this time with the exception of P
14 and N, which are you going to be providing additional
15 argumentation on the standing issue. We discussed that
16 yesterday. And then we will be coming back I believe
17 on October 10th is that --

11:37AM

18 MR. OSTER: Correct, Your Honor.

19 THE COURT: -- without looking at my calendar that
20 is what I recall at 1:30 to hear the argument on both
21 the standing issue and then if appropriate the merits
22 of P and N.

11:38AM

23 Is there anything that we need to do between now
24 and then or can we stand in recess so that I can
25 properly consider the motions leading up to that?

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1 MR. PORTER: Could I have just -- I don't mean to
2 be rude and extend the proceedings. I know it's been
3 long. Can counsel and I just have a minute to confer
4 with the client please, Your Honor.

5 THE COURT: Absolutely. Sure.

6 MS. COOK-REICH: Thank you, Your Honor.

7 (Off the record discussion between defense counsel
8 and defendant.)

9 THE COURT: When we went off record, Mr. Porter,
10 you requested a little bit of additional time to have
11 discussions with your client and with co-counsel. Have
12 you had that opportunity?

11:40AM

13 MR. PORTER: We have. I thank the Court for the
14 courtesy. We have nothing to add to proceedings at
15 this point, Your Honor.

16 THE COURT: All right. Mr. Oster?

17 MR. OSTER: Very briefly, Your Honor. One was
18 something we talked about yesterday, but to make sure
19 it is put on the record again today I understand there
20 may be argument as to it. I want to put it on the
21 record. The State probably will be in the interim
22 filing a motion for reciprocal discovery.

11:40AM

23 The other is the State will probably be filing a
24 motion to have the District Court release any evidence
25 they still may have in this case just so we make sure

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1 any and all evidence has gotten back into Butler County
2 from the District Court and other things. Just to make
3 the Court aware the State may be filing two motions in
4 those two regards.

5 THE COURT: All right. The motion with regard to
6 the District Court wouldn't be before me. That would
7 be a motion that you are saying you would be filing in
8 the District Court asking them to release exhibits. I
9 imagine that you would probably join in their request
10 in that regard so that you would that information, is
11 that --

11:41AM

12 MR. PORTER: We would not oppose it, Your Honor.

13 THE COURT: All right. Thank you. That is duly
14 memorialized and if there is nothing further at this
15 time I will retire to deliberate on your motions and I
16 will obviously attempt to have decisions forthwith with
17 the exception of the one that I am awaiting further
18 argumentation on. All right.

19 Counsel, unless contacted and advised that we need
20 to meet prior to that time, I will see everyone at 1:30
21 on October 10th. We are in recess.

11:41AM

22 (Proceedings concluded at 11:41 a.m.)
23
24
25

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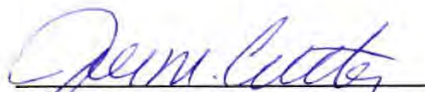
1
2 STATE OF OHIO)
3) SS. REPORTER'S CERTIFICATE
4 COUNTY OF BUTLER)

5 I Jill M. Cutter, RPR, do hereby certify that I am
6 a Registered Professional Reporter and Notary Public within
7 the State of Ohio.

8 I further certify that these proceedings were
9 taken in shorthand by me and by electronic means at the time
10 and place herein set forth and was thereafter reduced to
11 typewritten form, and that the foregoing constitutes a true
12 and accurate transcript, all done to the best of my skill and
13 ability.

14 I further certify that I am not related to any of
15 the parties hereto, nor am I in any way interested in the
16 result of the action hereof.

17 Dated at Hamilton, Ohio, this 31st day of March,
18 2008.

19
20 
21 Jill M. Cutter, RPR
22 Official Court Reporter
23 Butler County Common Pleas
24 Hamilton, Ohio 45011
25

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IMAGED

1

COURT OF COMMON PLEAS

BUTLER COUNTY, OHIO

FILED
2013 JAN -8 PM 2:41

CINDY CARPENTER
BUTLER COUNTY
CLERK OF COURTS

STATE OF OHIO,

Plaintiff,

Case No. CR-1983-12-0614

CA 09-10 -263

vs.

FILED BUTLER CO.
COURT OF APPEALS

HONORABLE ANDREW NASTOFF

VON CLARK DAVIS,

JAN 08 2013

ORIGINAL

Defendant.

CINDY CARPENTER
CLERK OF COURTS

MOTION HEARING

TRANSCRIPT OF PROCEEDINGS

November 24, 2008

JILL M. CUTTER, RPR
(513) 785-6596

(74)

1 APPEARANCES:

2
3 On behalf of the plaintiff:

4 MICHAEL A. OSTER, JR., ESQ.
5 Assistant Butler County Prosecuting Attorney
6 11th Floor
7 315 High Street
8 Hamilton, Ohio 45011
9 and
10 DANIEL G. EICHEL, ESQ.
11 Assistant Butler County Prosecuting Attorney
12 11th Floor
13 315 High Street
14 Hamilton, Ohio 45011

15 On behalf of the defendant:

16 MELYNDA COOK-REICH, ESQ.
17 Repper, Pagan, Cook
18 1501 First Avenue
19 Middletown, Ohio 45044
20 and
21 RANDALL PORTER, ESQ.
22 Assistant State Public Defender
23 250 East Broad Street
24 Suite 1400
25 Columbus, Ohio 43215

JILL M. CUTTER, RPR
(513) 785-6596

Transcript of Proceedings

Morning Session

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THE COURT: We're on record in State of Ohio vs. Von Clark Davis. CR83-12-0614. The record will reflect that the defendant Von Clark Davis appears with counsel, Mr. Porter and Ms. Cook-Reich. The States representatives assistant prosecutors Dan Eichel and Michael Oster appear on behalf of the State.

Counsel, I summoned you here for a hearing because there had been some new motions filed that I thought necessitated a brief hearing. I also wanted to update you on the status of the earlier motions that have been argued to the Court. I am going to indicate to you that I have a draft of my decision completed at 22 pages, probably will still have the final of that within the next day or two. I expect it to be filed and provided to counsel. If not, prior to close of business this week, certainly early next week just for your planning purposes. I wanted to advise you of that.

02:18PM

02:18PM

I would like to go through and catalog the issues that I have before me, and make sure that we are all on the same sheet of music. First, I have a second motion to be heard ex-parte on funding issues. I have a

JILL M. CUTTER, RPR
(513) 785-6596

1 defendant's motion to continue the resentencing hearing
2 that is currently scheduled to commence on
3 December 15th, and then I have the State's response to
4 the defendant's motion to continue.

5 Does anyone else have anything else that is on the
6 agenda for today or items that need to be discussed
7 today?

8 MR. OSTER: Your Honor, the only other thing I
9 would point out would be the State did file a motion
10 for discovery. The defense has filed a motion in
11 opposition to providing the State discovery.

02:18PM

12 JUDGE NASTOFF: I see that. Von Clark Davis'
13 response to discovery?

14 MR. OSTER: Yes, Your Honor.

15 JUDGE NASTOFF: All right.

16 MR. OSTER: Which in part I would say does tie
17 into what you have listed as on our sheet of music
18 number two. And that goes into our response to a
19 motion to continue as one of the issues as to why we
20 filed that response in that manner.

02:18PM

21 JUDGE NASTOFF: All right. Mr. Porter or Ms.
22 Cook-Reich, do you see anything else we need to be
23 discussing at today's hearing or is that pretty much --

24 MS. COOK-REICH: That is it, Your Honor.

25 JUDGE NASTOFF: You requested to be heard on the

JILL M. CUTTER, RPR
(513) 785-6596

1 funding issue prior to discussing the motion for a
2 continuance. And is there a particular reason?

3 MS. COOK-REICH: It goes into why we are
4 requesting for a continuance and we thought that you
5 having that information prior to -- it would be hard to
6 say we would like a continuance to have the prosecutor
7 here in the room and you go, why? And we go, well, we
8 can't tell you yet. We thought that you would like to
9 hear that first.

10 JUDGE NASTOFF: All right. All right. Let me ask
11 this: You reference in here that the request to be
12 heard ex-parte, this is essentially a continuation of
13 the previous ex-parte hearing; is that correct?

02:18PM

14 MS. COOK-REICH: It is regarding the same issue we
15 last were here on ex-parte.

16 THE COURT: So this isn't a separate request for
17 additional funding for some -- a separate expert. This
18 is regarding --

19 MS. COOK-REICH: We need to move some different
20 funds around.

02:18PM

21 JUDGE NASTOFF: Does the State wish to be heard on
22 their request? I mean, I understand the State's
23 position previously, that -- and I share the State's
24 position in large part that ex-parte motions are not to
25 be granted willy-nilly; that it is not an automatic

JILL M. CUTTER, RPR
(513) 785-6596

1 type of thing. But it appears to me that this is a
2 continuation of a previous issue that the Court already
3 determined was appropriate to be heard ex-parte. The
4 only thing I wanted to clarify first is the precise
5 scope of it because I think that it is appropriate that
6 the State understand the very limited scope that we
7 would be addressing ex-parte and that we stick only to
8 that issue until we invite the State back in.

9 MR. OSTER: To try to respond as briefly as
10 possible, we would note our continuing objection that
11 we filed, written, and that we have argued to the Court.
12 We understand the Court has ruled on that. If it is a
13 continuation of that, the Court's ruling is the Court's
14 ruling. We will ask our objection be noted, but that
15 is all.

16 JUDGE NASTOFF: All right. Well then, with that
17 being said, the Court is going to grant the defense's
18 request to be heard ex-parte on funding issues
19 regarding what they indicate is a -- concerning a
20 potential modification of the Court's previous entry.
21 With that being said, I do want to address these other
22 issues, so counsel if you could remain close by so that
23 that when we conclude this portion, we can come back in
24 and discuss the other substantive issues, but at this
25 point in time, I would suggest that we go into the

JILL M. CUTTER, RPR
(513) 785-6596

1 ex-parte session. And that would be the order at this
2 point in time.

3 (At this time, an ex-parte hearing was conducted
4 outside the presence of the assistant prosecuting
5 attorneys.)

6 JUDGE NASTOFF: The record will reflect that we
7 are back in full session in State of Ohio vs. Von Clark
8 Davis. The defendant and his counsel remain present.
9 Mr. Eichel and Mr. Oster from the prosecutor's office
10 have again joined us. And I believe the next issue for
11 us to address would be the motion to continue the
12 sentencing hearing.

02:19PM

13 The defendant's motion indicates that they needed
14 additional time to fully prepare their penalty phase
15 mitigation case and that they would not be able to be
16 in a position to be fully compliant with their duties
17 under the law by the December 15th date.

18 I have the State's response, which indicates and
19 kind of reminds the Court that we have a remaining
20 issue that is pending before the Ohio Supreme Court
21 regarding the Court's earlier order regarding prison
22 records. And so based on the fact that that issue has
23 not yet been ruled upon, the written motion of the
24 State indicates they do not oppose the defendant's
25 motion to continue the sentencing proceedings herein.

02:19PM

JILL M. CUTTER, RPR
(513) 785-6596

1 Can I make an inquiry whether anyone knows what the
2 current status of the matter before the Ohio Supreme
3 Court is and what the timing is if it is known?

4 MR. OSTER: I looked this morning on their online
5 docket it still hasn't been ruled on. The case is
6 open. It is just pending. Whether or not the Court, I
7 believe I will be correct, whether or not the Court
8 will accept jurisdiction in the case to hear it,
9 whether they are going deny it, based upon that
10 decision could determine a lot of different things, but
11 as of, I believe Mr. Eichel were in my office checking
12 at 8:45 this morning, and there is absolutely nothing
13 the online docket to indicate. And there is --

02:19PM

14 JUDGE NASTOFF: It's not been set for any argument
15 or --

16 MR. OSTER: No, Your Honor. Nothing will happen
17 until they would accept jurisdiction. If they accept
18 jurisdiction, it would get a briefing schedule and
19 would continue on. If they deny jurisdiction, the case
20 would be dead as far as they are concerned. But we
21 have no indication when they are going to decide it.
22 The only thing we can tell the Court, at least from the
23 State's behalf, is that nothing as of 8:45 this morning
24 was decided as to that issue.

02:19PM

25 JUDGE NASTOFF: All right. Well --

JILL M. CUTTER, RPR
(513) 785-6596

1 MR. OSTER: If I may, it kind of dovetails on to
2 it that the reason we wrote that and typically the
3 State would not be in a position to -- we don't
4 typically agree to a continuance. We understand speedy
5 trial issues and things like that, but without being
6 able to look at those records which obviously we have
7 already argued and rehashed a lot of different things
8 to this Court, the importance of those, without being
9 provided discovery, right now the State feels like we
10 are half blind in this case and to go forward and to do
11 what we are supposed to do in this case to fulfill our
12 role, mr. Eichel and I are of the position for the
13 State of Ohio, we can't go into this and represent the
14 State fully, half blind. And that is our concern and
15 that is why we wrote about the posture of the case
16 being what we see is the problem.

02:19PM

17 JUDGE NASTOFF: All right. Well, it appears at
18 least that there is agreement that for varying reasons
19 both sides don't believe that they are going to be in a
20 position to be ready to go forward with the
21 resentencing as scheduled on December 15th.

02:19PM

22 I know this Court had hoped to be able to resolve
23 the matter during that time period, but obviously the
24 Court doesn't want to let the tail wag the dog, so to
25 speak. What is important is that the case is done

JILL M. CUTTER, RPR
(513) 785-6596

1 right and that everyone is in a position to be able to
2 perform their duties appropriately. And it doesn't
3 appear to me that either side is not ready because they
4 have been dilatory in any way. It appears that both
5 sides are fulfilling their duties with vigor and
6 exercising appropriate due diligence, and that
7 circumstances have simply prevented us from being able
8 to go forward at that time.

9 Since it would be the defendant's motion, I don't
10 believe that there would be any time issues involved in
11 any delay regarding the federal court's order. There
12 had previously been a waiver, so to speak, of any time
13 limitations put on by the federal court. But I believe
14 that since this would be the defendant's motion, any
15 additional time would be taxed to the defense for
16 purposes, if not for speedy trial purposes, at least
17 for purposes of complying with the time requirements
18 ordered by the federal court. Is there any
19 disagreement with that from the defense?

20 MS. COOK-REICH: No, Your Honor. That would be
21 our position also and we fully discussed that with our
22 client. He has executed a declaration it's attached to
23 our motion to continue. He understands that this would
24 be taxed to him and it would not be an issue that we
25 were requesting.

JILL M. CUTTER, RPR
(513) 785-6596

1 JUDGE NASTOFF: All right. Well, I understand
2 where to a certain extent shooting in the dark since we
3 don't know exactly when the Supreme Court will have
4 made a decision. It could be tomorrow. It could be
5 three months. It could be six months from now. We
6 just don't know. I'm not looking to delay the case any
7 longer than is necessary, but I also don't want to be
8 in a position where everybody is geared up and we are
9 still waiting.

10 I have to say that I am somewhat hesitant to delay
11 the case solely on the basis of the Ohio Supreme Court
12 not having decided that issue. I understand the
13 State's position, and I don't argue with that, but
14 simply my concern is that there could be any number of
15 interlocutory appeals that could be sought in a case on
16 decisions that turn out to be -- that they aren't even
17 final appealable orders and if we continuously delayed
18 those matters, I mean we could never get to the
19 sentencing hearing. I certainly wouldn't want to set a
20 precedence that on that basis alone this Court would
21 entertain continuing, continuing and continuing the
22 case, but I think there has been a confluence here of
23 circumstances that dictate that we do continue the
24 matter.

25 Consistent with your representations made, you

JILL M. CUTTER, RPR
(513) 785-6596

1 have indicated that you feel that you would be ready to
2 proceed in the May to June time frame; is that correct?

3 MS. COOK-REICH: Yes, Your Honor. We request a
4 continuance to that time.

5 JUDGE NASTOFF: What does the State's schedule
6 look like?

7 MR. OSTER: Your Honor, to be honest with this
8 Court, if discovery were given tomorrow and if the
9 Supreme Court decided tomorrow we would be ready to go
10 in two weeks. So we are pretty much open. We will be
11 ready to go as soon as the Court can get us in and we
12 don't want to delay this any farther than we need to so
13 that would be the representations I would make on
14 behalf of the State.

02:19PM

15 JUDGE NASTOFF: Fair enough. Are we still
16 anticipating setting aside a week for the mitigation
17 case?

18 MS. COOK-REICH: Yes, Your Honor. No more than a
19 week, Your Honor.

20 JUDGE NASTOFF: Okay.

02:19PM

21 MS. COOK-REICH: Even if we were allotted a jury
22 it wouldn't take longer than a week.

23 THE COURT: I think even by Mr. Porter's
24 arguments, it doesn't appear that a jury is an issue.
25 I believe if I remember Mr. Porter's argument, if the

JILL M. CUTTER, RPR
(513) 785-6596

1 Court were to find that a three-judge panel couldn't
2 hear the case, that he thinks that a jury wouldn't be
3 appropriate either. It would be that the Court would
4 have to impose one of the life options. I think -- am
5 I correct?

6 MR. PORTER: That is correct, Your Honor.

7 JUDGE NASTOFF: So I think under either scenario,
8 we are looking at a three -judge panel. It's just
9 whether it is going to go forward as contemplated under
10 the current version of the statute or whether the
11 hearing would be quite short if you were to prevail.

02:19PM

12 MR. OSTER: On behalf of the State, I don't think
13 we would take probably much more than a half a day with
14 our presentation.

15 JUDGE NASTOFF: I'm not suggesting that this case
16 resembles anything else that the Court has done any
17 time recently, but typically in this Court's experience
18 the State case at resentencing is fairly short. Even
19 the defendant's case is what I have seen at most two
20 days. So I figure if we go four days that ought to be
21 plenty of time and then obviously we would make the
22 appropriate adjustments if need be. How about Monday
23 May 11th, that week?

02:19PM

24 MS. COOK-REICH: Yes, Your Honor. That would be
25 good for the defense.

JILL M. CUTTER, RPR
(513) 785-6596

1 JUDGE NASTOFF: Does that work?

2 MR. OSTER: Yes, Your Honor.

3 JUDGE NASTOFF: Can I have a pretrial order? That
4 will get us past any potential scheduling issues, too,
5 with trials and any judges that have kids with spring
6 break issues, counsel with kids with spring break
7 issues, anything like that.

8 I have a pretrial order here for counsel to sign
9 setting the new sentencing hearing on May 11th, 2009,
10 at 9:00 a.m. scheduled for four days indicating that
11 the 12-15-08 sentencing hearing is continued to that
12 date on motion of defendant's counsel without objection
13 from the State.

02:19PM

14 Why don't we go ahead and have that signed. Have
15 Mr. Davis sign it as well, just indicating he is aware
16 of his new date. That will be the order in that
17 regard.

18 Now, there is the matter of the dispute on
19 discovery. And let me see if I can boil down the
20 arguments of both sides here and make sure that I am
21 understanding where each side is coming from on this
22 issue. From the State's perspective, it's my
23 understanding that the State argues that there was a
24 request for discovery filed in the original action in
25 this case in the original trial in this case, that that

02:19PM

JILL M. CUTTER, RPR
(513) 785-6596

1 was a general discovery request. That it triggered a
2 reciprocal duty under Criminal Rule 16 on the part of
3 the defense to provide reciprocal discovery and that
4 although this is a de novo sentencing hearing, it is a
5 sentencing hearing that is a part of CR83-12-0614, the
6 same case, and therefore that previous discovery
7 request and reciprocal discovery duty should continue
8 to apply in this hearing. Is that roughly your
9 position?

10 MR. EICHEL: Yes, Your Honor, exactly. And 16(C)
11 is the basic authority that says both sides have a
12 continuing duty to comply with the original discovery
13 in this case. So Judge Brewer by the same token on
14 February the 8th, 1984, issued an order to the defense
15 to provide discovery in response to the State's April
16 25th, 1984 -- their original request was April 25th,
17 1984. The State responded giving everything that they
18 were entitled to under that request. The order says
19 defendant shall be ordered to provide discovery to the
20 State under Criminal Rule 16(C). And Rule 16, I forget
21 which subparagraph, it is beyond (C), there is a
22 continuing duty and that is what we have always
23 understood. If there is a re-trial or re-hearing,
24 resentencing the State is under a continuing duty to
25 disclose without any necessity for a new request for

02:19PM

02:19PM

JILL M. CUTTER, RPR
(513) 785-6596

1 discovery. By the same token, both sides have that
2 continuing duty.

3 JUDGE NASTOFF: All right. And then my
4 understanding through the defense argument is that
5 essentially that was a discovery request that was filed
6 by previous counsel some 25 years ago, that since this
7 is a de novo sentencing hearing, a new sentencing
8 hearing, it should not be viewed as a continuation of
9 the previous sentencing hearing, but rather as a new
10 proceeding, and that since the defense, during this
11 period of litigation, has requested only a specific and
12 limited demand for discover invoking certain
13 subsections of Criminal Rule 16, that their reciprocal
14 duty should only lie in those parallel specific
15 subsections of Criminal Rule 16 and not be -- not go
16 any farther than that. Is that a correct, I guess,
17 summary?

02:19PM

18 MR. PORTER: That is a fair statement and I think
19 this is very similar to some of the arguments that the
20 Court addressed in August of whether this is a whole
21 new proceeding or this is a continuation of the '84
22 proceedings.

02:19PM

23 JUDGE NASTOFF: All right. I'm going to tell you
24 that obviously this is not a circumstance that has
25 arisen before this Court before where we have had a

JILL M. CUTTER, RPR
(513) 785-6596

1 trial and then a separate sentencing hearing, and then
2 it be remanded 24 or 25 years after the fact back to
3 the Court for a de novo sentencing hearing. So I am
4 not sure -- when I am asking for -- I can tell you
5 that I have not found any authority that even addresses
6 any scenario or factual scenario remotely similar, but
7 I would ask if counsel has -- I know there have been in
8 the past cases that have been remanded for
9 resentencing, certainly not the first time in history
10 that that has ever happened. Has this issue ever arose 02:19PM
11 to counsel's knowledge in prior case law? Is there any
12 authority for the State's position or for the
13 defendant's interpretation or is this really a matter
14 of where the Court is going to have to be guided by the
15 language of the rule itself and by analogy to some
16 similar situation? Mr. Oster?

17 MR. OSTER: Your Honor, I can speak at least a
18 little bit on behalf of the State. I have looked, not
19 to the extensive fact that I want to say a hundred
20 percent, but I did look and could not find a completely 02:19PM
21 analogous situation to this. It does seem to be a bit
22 of anomaly. I did look in a couple of other states
23 even to see some Federal rules. There are some Federal
24 things that touch on, but do not -- I wouldn't say that
25 they address on all fours, or don't squarely look at

JILL M. CUTTER, RPR
(513) 785-6596

1 this issue, so in my brief kind of preparing for
2 today's hearing, just looking at the issue itself in a
3 once-over kind of way, I did not see anything that I
4 think would be a hundred percent authoritative to this
5 Court.

6 while the State understands it is a de novo by the
7 6th Circuit, it doesn't take away, in the State's
8 position the fact that this is still a two-part hearing
9 and we are still in part two, but you don't have a part
10 two, without a part one.

02:19PM

11 But to answer the Court's question, I will not
12 keep going, I did not find anything at this point that
13 I believe is hundred percent authoritative on this
14 issue.

15 JUDGE NASTOFF: Are there any situations that you
16 views as analogous to this situation? For example,
17 cases where there has been a substitution of counsel in
18 the course of the case and there was previous discovery
19 requested by preceding counsel, but subsequent counsel
20 sought not to be bound? Are there any situations like
21 that that have arisen that have generated case law to
22 your knowledge?

02:19PM

23 MR. OSTER: To my knowledge, I ran across a couple
24 where they talked about substitution. They weren't the
25 ones that I read at full scale. They did not seem to

JILL M. CUTTER, RPR
(513) 785-6596

1 be saying, at least the ones I found, because I did try
2 that avenue and again even more brief than other, maybe
3 one or two times I punched something in trying to find
4 some terms in Westlaw. And while I found some that
5 talk about substitution, I didn't find any where then
6 it was attempted to be limited from what counsel had
7 first requested and then the State objected to that.
8 And I did not find any where there was substitution in
9 my brief looking that had this exact kind of footprint
10 where there was a full request. It was given. It was
11 supplemented. There was the order making reciprocal
12 discovery. Reciprocal discovery was given, and then
13 later on when substitution of counsel would happen,
14 that counsel would say no, we only want limited and try
15 to take everything away from what was previously done.
16 I did not find that even in substitution of counsel
17 cases.

02:19PM

18 JUDGE NASTOFF: Mr. Porter or Ms. Cook-Reich, same
19 question: Is there any authority that you have come
20 across from any situation that would be factually
21 analogous that you could point the Court to, to assist
22 the Court in resolving this issue or if not factually
23 similar, at least an analogous situation where the
24 Court could, I guess, it would grant some type of
25 additional authority to your position?

02:19PM

JILL M. CUTTER, RPR
(513) 785-6596

1 MR. PORTER: I know of no additional authority and
2 this is the second re-trial -- resentencing hearing I
3 have been involved with, Your Honor, and it did not
4 come up in the earlier resentencing hearing.

5 JUDGE NASTOFF: All right. And I just want to see
6 if I follow the ramifications of the request here.

7 Mr. Porter, are you suggesting that if the earlier
8 request for discovery does not apply to you, and if we
9 are only to be guided by your new limited request, what
10 do you see as being the fallout of that? Is it that
11 you are not going to be required to disclose reports
12 even of witnesses that you may have testify? Is it --
13 I mean, what is the -- you don't have to provide a list
14 of who you may intend to call? I'm just trying to
15 figure out what the fallout of that would be in terms
16 of how we proceed.

02:19PM

17 MR. PORTER: I believe that Mr. Davis would have
18 no obligation under Criminal Rule 16. That is why we
19 drafted our motion like we did, Your Honor. I do not
20 know honestly, and I believe this is an issue left open
21 for litigation, whether the Court has the ability to
22 order an expert to prepare a report outside Criminal
23 Rule 16.

02:19PM

24 JUDGE NASTOFF: All right. But what you are
25 suggesting is that he wouldn't have an obligation to

JILL M. CUTTER, RPR
(513) 785-6596

1 provide a list of witnesses -- to provide, I mean, I
2 don't know that he would be required. I don't think
3 the experts would be required to prepare a report, but
4 if there is a report prepared, generally if there is
5 discovery issues, that would be provided if that
6 witness was going to be called. But you are saying
7 that none of that would apply to Mr. Davis going
8 forward?

9 MR. PORTER: That is correct, Your Honor.

10 JUDGE NASTOFF: Is that how you see it?

02:19PM

11 MR. OSTER: It's how they phrase it and how they
12 requested it. The only thing I would bring to the
13 Court's attention is the only case I can think of that
14 has happened in this county that is even somewhat
15 similar and there wasn't a request by the State, is
16 *State vs. Donald Ketterer* where it did come back for
17 the non-capital issues and I know that the defense in
18 that case, Mr. Porter being counsel, did make a request
19 in that case for additional discovery at the sentencing
20 -- resentencing hearing of the non-capital. The State
21 in that case, while we did not give Mr. Porter, and I
22 am sure he would admit to this, everything he thought
23 he was entitled to under that rule, we did provide more
24 discovery because the State -- this isn't the only case
25 we have said this, the State believes we do have that

02:19PM

JILL M. CUTTER, RPR
(513) 785-6596

1 continuing duty upon resentencing and if the case is
2 still going. That is why we gave it in this case
3 itself. We are not trying to do anything different
4 with the rules other than just say when a case comes
5 back if it's in a part two, part one still exists and
6 we still have that duty and that is all we are asking
7 the defense be held to as well, Your Honor.

8 JUDGE NASTOFF: Go ahead.

9 MR. PORTER: Cases run together. It's been a
10 while. My recollection, and I am just saying it's my
11 recollection, Your Honor, is that we did not get any
12 discovery in Mr. Ketterer's case on resentencing. I
13 know we filed a Brady motion, and the Court denied the
14 Brady motion that we filed and that is my recollection
15 of the only discover request that was made. I could be
16 wrong, but that is just my recollection. I certainly
17 would be willing to file with the Court within two
18 days, copies of any discovery. My recollection is, I
19 know it was a three-judge panel and I know the panel --
20 we argued the Brady motion up front. The panel then
21 went into deliberations, came back and denied the
22 specific Brady motion.

23 JUDGE NASTOFF: I don't need you to supplement
24 with any additional filings. My access to the Ketterer
25 file is probably as good as yours. I'm going to take

JILL M. CUTTER, RPR
(513) 785-6596

1 the matter under advisement. And I'm going to issue a
2 decision. I will try to get a decision out along with
3 the decisions on the other motions that are pending
4 before the Court, so that everyone has an appropriate
5 amount of time to react to that and to game plan
6 appropriately going forward given the new sentencing
7 date. So with that being said, that matter will be
8 under advisement.

9 All right. Is there anything further, then, that
10 we need to take up at this time that we haven't already
11 addressed?

02:19PM

12 MR. OSTER: This is more housekeeping, Your Honor,
13 I don't believe you signed them because I had them
14 printed off and none are signed. I don't believe you
15 signed yet the entry for transport for December 15th.
16 And if it is not signed, we don't have to vacate it. I
17 have a lot of copies that I believe I was going to have
18 you sign today if it went. So I will double-check that
19 and I will make sure that either way we get --

20 JUDGE NASTOFF: If we need to vacate that order, I
21 will vacate it and we can put on a new transport order
22 for the May 11th date. I mean, counsel, when would you
23 want Mr. Davis brought down? Obviously, he would be
24 brought down at least the Friday before the Monday
25 hearing, but would you want him brought down any

02:19PM

JILL M. CUTTER, RPR
(513) 785-6596

1 earlier than that for preparation purposes?

2 MR. PORTER: Could we have the Thursday before as
3 opposed to the Friday before, Your Honor?

4 THE COURT: Mr. Oster, would you be so kind as to
5 use that date? I need to look. Let me see. To have
6 him transported on Thursday, May 7th?

7 MR. OSTER: Yes, Your Honor.

8 THE COURT: All right. If there is nothing
9 further, then, on this matter, we will be in recess.
10 We don't have anything that I can see docketed, any
11 further hearings between now and May 11th. Are we all
12 right with leaving it that way or should we set some
13 type of a final pow-wow in the weeks leading up to
14 that? Or maybe even on that Friday the 8th just to
15 assure anything we need?

02:19PM

16 MR. PORTER: On behalf of Mr. Davis, we don't
17 think we need a date certain. We would like to leave
18 it open if an issue comes up prior to May 11th, that we
19 could approach the Court and the Court could schedule a
20 hearing as it may deem fit.

02:19PM

21 JUDGE NASTOFF: I have tried to make a practice of
22 being flexible in those types of situations. Beyond
23 that, any request from the State?

24 MR. EICHEL: Nothing that we can foresee. Thank
25 you.

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1 JUDGE NASTOFF: Obviously, if something does come
2 up that wasn't foreseen today, then counsel file the
3 appropriate motions and get it -- bring my attention to
4 it and we will get things put together so that we can
5 get back together on the record prior to that time.

6 As it stands at this point in time, we will be in
7 recess on this matter until 9:00 a.m. on May 11th,
8 when we will proceed. I will send out an updated
9 e-mail to the judges, so that they can have that date
10 available in the event that we go forward with a new
11 three-judge panel. And it is going to be based on the
12 same list that was selected I believe in, I want to say
13 it was in March, and if memory serves the order was
14 Spaeth, Pater, Powers, Hedric, Oney.

02:19PM

15 MR. OSTER: Correct, Your Honor. And it was
16 March 6, '08 when that was done.

17 JUDGE NASTOFF: All right. Fair enough. We are
18 in recess.

19 (Proceedings concluded at this time.)
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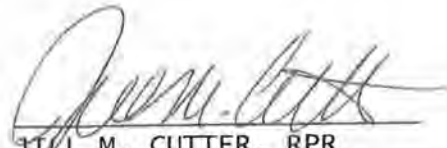
1
2 STATE OF OHIO)
3) SS. REPORTER'S CERTIFICATE
4 COUNTY OF BUTLER)

5 I, JILL M. CUTTER RPR, an Official Court Reporter
6 and Notary Public within the State of Ohio do hereby certify
7 that the foregoing proceedings were taken in stenotype by me
8 at the time and place herein set forth and thereafter reduced
9 to typewritten form;

10 That the foregoing 25 pages constitutes a true and
11 accurate transcript of the proceedings held, all done to the
12 best of my skill and ability.

13 I further certify that I am not related to any of
14 the parties hereto, nor am I in any way interested in the
15 result of the action hereof.

16 IN WITNESS WHEREOF, I have hereunto set my hand at
17 Hamilton, Ohio, this 22 day of December, 2009.

18
19
20 
21 JILL M. CUTTER, RPR
22 Official Court Reporter
23 Butler County Common Pleas
24 Hamilton, Ohio 45011
25

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COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

FILED
2009 APR 19 AM 10:37
CLERK OF COURTS
BUTLER COUNTY, OHIO

STATE OF OHIO,

Plaintiff,

Case No. CR83-12-0614

HONORABLE ANDREW NASTOFF

vs.

VON CLARK DAVIS,

Defendant.

MOTION HEARING

TRANSCRIPT OF PROCEEDINGS

APRIL 8, 2009

JILL M. CUTTER, RPR
(513) 785-6596

1 APPEARANCES:

2

3 On behalf of the plaintiff:

4 DAN EICHEL, ESQ.
5 MICHAEL OSTER
6 Assistant Prosecuting Attorneys
315 High Street, 11th Floor
Hamilton, Ohio 40511

7 On behalf of the defendant:

8 MELYNDA COOK-REICH, ESQ.
9 RANDALL PORTER, ESQ.

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TRANSCRIPT OF PROCEEDINGS

MORNING SESSION

* * * * *

THE COURT: All right. We are on record in State of Ohio vs. Von Clark Davis. This is CR83-12-0614. I will note for the record that Mr. Randall Porter and Melynda Cook-Reich appear on behalf of Mr. Davis. For the State of Ohio, assistant prosecutors Dan Eichel and Michael Oster appear. I will note as the first matter that we should take up today, that Mr. Davis, himself, is not present at today's hearing. And to that point I'm going to indicate that I am in receipt of a -- what has been captioned, Von Clark Davis' Notice of Filing, file stamped today's date, April the 8th, reads that, "Von Clark Davis provides notice of filing with this Court of the following attached document: Waiver of appearance of Von Clark Davis for the April 8th, 2009 pretrial." And attached thereto is another document captioned, "Waiver of appearance of Von Clark Davis for the April 8, 2009 pretrial."

And it states, "I, Von Clark Davis, for the limited purposes of the April 8th, 2009 pretrial, waive my appearance at the April 8th, 2009 pretrial. I have been advised of my right to be present under both of

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1 the Ohio and Federal Constitutions, as well the Ohio
2 Criminal Rules. I waive my rights under those
3 provisions." Signed by Von Clark Davis. And is that
4 his inmate number following that or --

5 MR. PORTER: That is correct, Your Honor.

6 THE COURT: All right. Mr. Porter, you filed this
7 document so I would just ask for you to document, for
8 purposes of the record, how you obtained this and
9 affirm that it is, in fact, Mr. Davis' wish to go --
10 for you to go forward today without his appearance.

11 MR. PORTER: It is Mr. Davis' wish to go forward
12 without his appearance today. I spoke with him on the
13 telephone on this past Monday, which would make it
14 April 6th, on a telephone call at approximately 9:00
15 a.m. While we were on the telephone, the waiver was
16 presented to him by the case manager. He read it over
17 and told me he would sign it. Obviously since he was
18 not in front of me I did not actually witness the
19 signature, but it was his indication once again, in
20 fact, he was calling. I had arranged the call and he
21 had also requested a call with me for the purpose of
22 making sure that the waiver was presented to the Court
23 and that he would not have to appear today.

24 I would, along those lines, ask the Court not to
25 somehow draw inference from the waiver that he doesn't

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1 care about these proceedings. There was some other
2 matters going on in his case and it was our belief that
3 those matters needed to be taken care of rather than
4 his appearance today. Does the Court have any
5 additional questions, Your Honor?

6 THE COURT: Not at this time. I would certainly
7 never draw any such inference. I understand that there
8 are reasons having to do with trial preparation
9 strategy and those types of issues that factor in. I
10 just wanted to assure that it was a knowing,
11 intelligent and voluntary waiver of his appearance.
12 And based on your discussions, you can advise to the
13 Court as an officer of the Court that it is a knowing,
14 intelligent and voluntary waiver on his part?

15 MR. PORTER: It is, Your Honor.

16 THE COURT: All right. Does the State desire that
17 I inquire any further on that issue?

18 MR. EICHEL: No, Your Honor, we are satisfied with
19 this procedure.

20 THE COURT: All right. We will adopt that and
21 find that Mr. Davis has knowingly, intelligently and
22 voluntarily waived his appearance at today's hearing.
23 This is categorized as a pretrial. We currently have
24 the penalty phase in this case scheduled to begin on
25 Monday, May 11th, and we have blocked out that week, if

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1 necessary, for those proceedings. Not knowing exactly
2 how long they may take, we wanted to block out the
3 entire week for that purpose. What I would like to do
4 is, and perhaps I will begin with the State and then
5 ask the defense, can you please -- let's, before we get
6 into the substance of any particular issue, let's
7 catalog the issues that we believe that we need to
8 address at today's hearing, so that we are all on the
9 same sheet of music and then we can address these
10 seriatim.

11 So Mr. Eichel or Mr. Oster, if you would care
12 to -- I just want to make sure that what you have got
13 on your plate and what I have on my plate and what the
14 defense has on their plate is all the same.

15 MR. EICHEL: Very good. Your Honor, as I
16 understand it, the State has two motions pending. One
17 is a motion for an order regarding discovery
18 forthcoming from the defense --

19 THE COURT: Okay.

20 MR. EICHEL: -- that was ordered back in December.
21 The second motion is the motion regarding procedure to
22 be followed on consideration of the trial transcript.

23 THE COURT: All right.

24 MR. EICHEL: It's also my understanding there is a
25 third -- there is an unresolved motion that the Court

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1 has not resolved regarding a motion for reconsideration
2 of the order back a year ago, in March a year ago by
3 which the prison file of Mr. Davis was released to both
4 parties.

5 THE COURT: Okay. That was, if memory serves,
6 that was a motion for a stay, correct? Or
7 reconsideration of a stay, I believe that was the
8 relief that was requested?

9 MR. OSTER: I believe it was a reconsideration.

10 THE COURT: Okay. All right. And anything else
11 that you are aware of?

12 MR. OSTER: Nothing else as far as motions have
13 been filed. The only other thing I would note briefly
14 for the record is the State did file supplemental
15 discovery yesterday on April 7th. That supplemental
16 discovery said it was served by mail, but I talked to
17 at least one of defense counsel, I talked to Ms.
18 Cook-Reich, tried to call Mr. Porter, and I determined
19 after talking to defense counsel, it probably would be
20 better if I just hand served them here today. They
21 would get it faster. So it was not served by US mail
22 and I did give them a copy of that. They each have one
23 here today.

24 THE COURT: All right. Okay. The record will
25 reflect that. Mr. Porter or Ms. Cook-Reich, do you

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1 agree with the catalog of issues referenced by the
2 State? Are there any additional issues that you are
3 aware of that we need to take up today?

4 MS. COOK-REICH: No, Your Honor. We would agree
5 that that is what is set forth today and that is what
6 we are ready for.

7 THE COURT: Okay. One thing that I wanted to add
8 to the list, these are just, again, procedural issues,
9 one is I wanted to remind counsel of the order of names
10 for the prospective three judge panel. And I'm going
11 to indicate for the record that I have not, as of this
12 moment, confirmed availability, but it is my intent at
13 the close of this hearing to send out an e-mail to
14 these judges to formally confirm their availability on
15 the 11th and, of course, it will be in the order that I
16 am going to read in a moment, and this was an order
17 that was selected by draw back on March 6, 2008. And
18 then there is one issue that has come to my attention
19 regarding this order that I want to address on the
20 record, okay.

21 What I have is the order of priority, obviously, I
22 would be the presiding judge since the case is assigned
23 to me, and then the judges are in the following order
24 of the priority, Judge Keith Spaeth, Judge Charles
25 Pater, Judge Noah Powers, II, Judge Craig Hedric and

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1 Judge Patricia Oney, in that order. And like I said, I
2 will confirm their availability at the close of this
3 hearing by e-mail. I will make copies of any of those
4 e-mails and file them in the -- with the Clerk of
5 Court's Office so that that e-mail traffic is properly
6 preserved.

7 The thing that I wanted to bring up is I am aware
8 from other cases that Judge Powers has been recusing
9 himself in any matters in which Ms. Cook-Reich is
10 counsel of record. I remember, I think back on March
11 6th, 2008 we briefly touched on that, but I think that
12 I indicated that certainly more than a year would have
13 passed by this time and I was of the opinion that any
14 of the concerns under the Cannons, Judicial Cannons or
15 the ethical rules would be alleviated, but it's my
16 understanding, and I am not privy to all of the
17 details, but it is my understanding that as recently as
18 last week, he has recused himself from a case that you
19 are involved in as counsel.

20 MS. COOK-REICH: That is correct, Your Honor, he
21 is still currently recusing himself.

22 THE COURT: So, with that in mind, I did, just
23 before coming out on the bench, contact Judge Powers by
24 way of telephone to remind him that he was fourth on
25 the list, that if Judge Spaeth and Judge Pater are

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1 available it would be irrelevant since, you know, he is
2 next on the list, but should one of them not be
3 available, he would be up. And I inquired as to
4 whether he would be continuing to recuse himself and he
5 indicated that he would. That he thought that there
6 was still pending business with the prior firm, that he
7 thought should dictate that he continue to recuse
8 himself until those matters are resolved, and didn't go
9 into any further detail and I didn't ask any further
10 detail.

11 So, with that being said, I just wanted to raise
12 that issue for the record and seek input from defense
13 counsel.

14 MS. COOK-REICH: Nothing further. He has been
15 recusing himself from my cases. I just had a case that
16 bounced from him most recently, Lesley Moore, and I
17 know when the new capital case got appointed recently,
18 because it was already assigned to him, both myself and
19 Mr. Pagan are taken out of the running for appointment
20 on that case.

21 THE COURT: All right. Okay. Well, then, what I
22 am going to indicate is, since that is the case, I am
23 going to indicate for the record that Judge Powers will
24 not be available. So, the priority would be Judge
25 Keith Spaeth, Judge Charles Pater, Judge Craig Hedric,

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1 Judge Patricia Oney. Judge Powers would be recusing
2 himself for the reasons we stated, and previously Judge
3 Sage has recused himself since he participated in the
4 original prosecution of this matter. He was a member
5 of the prosecution team, I believe, back in 1983. All
6 right. Any questions on that?

7 MR. OSTER: No, Your Honor.

8 THE COURT: Any objections to me contacting by way
9 of e-mail after this hearing to confirm availability
10 for the hearing and me then forwarding that e-mail
11 traffic to both defense counsel and the State for your
12 planning purposes?

13 MS. COOK-REICH: No objection, Your Honor.

14 MR. OSTER: None on behalf of the State.

15 THE COURT: Fair enough. All right. Do we want
16 to discuss the discovery issue first or do we want to
17 discuss the procedure issue first? Is there a
18 consensus, or should I just pick one?

19 MS. COOK-REICH: Pick.

20 THE COURT: All right. Why don't we discuss the
21 discovery issue first, and let me see if I can recite
22 for the record where I believe we are. I know that as
23 a part of the pretrial motion litigation that we were
24 involved in some months ago, there was a dispute
25 between the State and the defense as to whether there

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1 was an obligation for the defense to respond to -- or
2 whether there was a continuing discovery request from
3 the original trial phase that continued and had
4 viability for purposes of these current hearings. I
5 considered those issues, considered the law that was
6 cited and conducted further research and issued a
7 written ruling indicating that I believe that there was
8 an ongoing discovery order and an obligation, both a
9 reciprocal obligation and a continuing obligation also
10 on behalf of the state that did apply in this matter.
11 And I don't have the specific date of that ruling
12 before me, but I believe it was some time --

13 MR. OSTER: December 29.

14 THE COURT: December 29th. All right. On March
15 the 12th I received a motion for an order or sanctions
16 under Criminal Rule 16 (E) for defense non-disclosure
17 of discoverable matters. I then received on March
18 24th, 2009, Von Clark Davis' answer to request for
19 discovery, and of course, I received the State's
20 supplemental discovery that was referenced earlier
21 today that was file stamped yesterday. Does this
22 resolve the issue?

23 MR. EICHEL: Your Honor, not necessarily. The
24 filing that was given to us --

25 MS. COOK-REICH: That would be the exact same one

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1 the Judge has.

2 MR. OSTER: -- from the defense basically says we
3 will supplement upon receipt. which, you know, that's
4 -- it gives us a sheet of paper saying that they are
5 going to give us discovery, but it doesn't give us
6 discovery.

7 THE COURT: All right.

8 MR. EICHEL: So, that is our difficulty with that.
9 Further, the only witness named is Mr. Davis himself,
10 and certainly wouldn't -- even if his name wasn't
11 named, I don't think we would object to him being
12 called at trial, or at the sentencing, because he
13 certainly has a right of allocution, if nothing else.
14 At any rate, I want to speak to the case law that I
15 cited in the motion and memorandum in support. I
16 acknowledge that it doesn't concern a sentencing in a
17 capital case. Not a single case does concern that.

18 So, witness preclusion as a sanction, I have to
19 state on the record now that I am not sure that that is
20 an appropriate sanction in a capital proceeding.

21 THE COURT: And there are, I think is also a rub
22 that has been recognized in case law between
23 constitutional rights and discovery provisions that
24 would come into play also.

25 MR. EICHEL: Absolutely. So witness preclusion

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1 may be off the table. However, the Court still has the
2 right to set discovery deadlines, the right to order
3 discovery, the -- all of the reasons for discovery
4 still apply here. And absent witness preclusion, the
5 Court certainly has a lot of options as far as
6 sanctioning orders, appropriate orders which Criminal
7 Rule 16 says the Court can issue any appropriate order
8 in regard to discovery violation. That said, that is
9 the State's position.

10 THE COURT: All right. Ms. Cook-Reich or Mr.
11 Porter?

12 MS. COOK-REICH: I will speak to this, Your Honor.
13 First off, I find it ironic that they want us to name
14 witnesses that I haven't yet identified for purposes of
15 our sentencing. If they would like me to just give
16 them a hundred people that might be called, I can start
17 naming people. They have their own list. I suppose
18 they could start with their own list of persons that
19 they provided and go from there. But at this point in
20 time, on today's date, other than Von Clark Davis,
21 neither myself nor Mr. Porter have identified a witness
22 to be used, and I can say that as of today's date, I do
23 not have a report or documentation that I intend to use
24 at our sentencing phase.

25 As this Court is aware, we have some ongoing

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1 matters that we have had some ex-parte hearings on, and
2 when those are concluded, Mr. Porter and I will meet
3 and make, I will call it a trial strategy, and make
4 that list. I find it odd to think that the prosecutor
5 doesn't have an idea of who we might call, if they want
6 to go that route, because this matter has been going on
7 for twenty years and there are affidavits attached to
8 the habeas proceedings of potential witnesses. If they
9 would like me to just simply list all of those and they
10 can, not knowing that I am going to call them, I will
11 do that. But I don't think that sanctions are even
12 proper in this case.

13 In regards to exclusion of witnesses, I believe
14 our client has some constitutional rights that would
15 preclude that, in my opinion. And I would just point
16 to the fact that on many occasions in multiple charge
17 cases with the prosecutor's office from this county, I
18 could get discovery the Friday before trial and I don't
19 get any of those witnesses excluded or those documents
20 or tests excluded. I will -- when I -- when Mr. Porter
21 and myself identify those witnesses that we are going
22 to use and we determine our proper strategy that we are
23 going to use, I will be forthcoming.

24 When I received the State's motion I believe I was
25 on vacation, so when I got to the stack of things that

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1 were on my desk when I got to their's and saw that, I
2 called Mr. Porter and said, who do you want to list
3 because we haven't identified. I said, thus far, Von
4 Clark. I put together the answer, sent it off to the
5 Court and the prosecutor immediately.

6 THE COURT: So you are representing as, again, as
7 an officer of the Court, that the answer filed on March
8 24th, at that time, and as of today's hearing, truly
9 and accurately reflects the state of your discovery in
10 this case?

11 MS. COOK-REICH: It is, Your Honor, and I am sure
12 the prosecutor can look at the docket sheet from the
13 clerk's office and see that we have not issued any
14 subpoenas. And that would primarily be what we would
15 be doing when we determine who those persons are that
16 we are going to call.

17 THE COURT: All right. I will accept that. I
18 would simply for purpose -- and I don't know that I
19 need to do this, but for purposes of the record, I
20 would simply remind counsel for both sides that this
21 Court would expect everyone to engage in appropriate
22 zealous advocacy on behalf of their respective sides of
23 the case within the ethical rules, and that based on
24 your representations at this time, I don't have any
25 reason to believe otherwise. But certainly as soon as

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1 you are aware of a witness and/or a report, and/or a
2 document or tangible evidence that you intend to
3 utilize at the penalty phase, you would have a duty to
4 supplement, which you have acknowledged in your
5 response. And given the calendar date, please make
6 your best effort to make that as timely as possible.
7 And upon receipt of that, counsel, the state, if for
8 some reason the date of any possible disclosure creates
9 issues that you think you need to bring up with the
10 Court, then do so. All right?

11 But I don't know that at this time there is a
12 whole lot more that I can do. Everyone here
13 understands Criminal Rule 16. The response here to me
14 is an indication that the defense, for purpose of these
15 hearings, has accepted the Court's earlier ruling, may
16 not agree with the Court's earlier ruling, but it has
17 accepted it and is following that order, and this is
18 what they indicate is the status of their discovery.
19 Anything further that the State would like to indicate?

20 MR. EICHEL: If Your Honor please, the
21 representation of the counsel begs the question, how do
22 we prepare if we get this last-minute name on the day
23 of trial or whenever they choose to decide that this
24 person is going to be called? This case has been
25 pending for -- this resentencing has been pending since

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1 the Court ordered it almost well over a year ago.

2 THE COURT: Well, I understand. I'm not going to
3 operate under the assumption that anybody is sand
4 bagging. I don't think it is appropriate to make that
5 assumption. They have indicated as officers of the
6 court that that is the status, that they are aware of
7 their duty to supplement, and that they will timely do
8 so as soon as possible. And what I have indicated in a
9 vague fashion, because I think it is the only way I can
10 indicate it at this point, is that should the State,
11 having received that, find itself in the position that
12 it needs to request some sort of relief or order or
13 something, I'm not sure what, because obviously we
14 are -- we don't know what might be disclosed, we're
15 just not in that position at this point in time, please
16 bring that to my attention. I will analyze the
17 situation that is before the Court at that time and try
18 to make a ruling that would effectuate the best
19 interests of justice consistent with the law and the
20 rights of the defendant.

21 MR. EICHEL: Thank you, Your Honor.

22 THE COURT: All right. And everyone has fax
23 numbers for -- everyone has fax numbers for each other
24 so that in the event --

25 MS. COOK-REICH: I would normally send them by fax

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1 or e-mail. It makes it easier --

2 THE COURT: I would ask the state likewise as we
3 move forward since we are just more than a month out at
4 this point in time, if you have updates or supplements
5 to your discovery, make sure that you have accurate fax
6 numbers for the defense and fax that to them so that
7 they can have it at the earliest possibility, and if
8 the defense would exercise that same courtesy,
9 professional courtesy, and provide any supplemented
10 discovery by way of fax, obviously to be followed up
11 with filing with the Court.

12 MS. COOK-REICH: Any time I actually personally
13 file our documents, I just bring them right up to the
14 prosecutor's office. I can't remember the last time I
15 mailed something from there.

16 THE COURT: Mr. Porter?

17 MR. PORTER: To alleviate the Court's fear, and
18 getting back to the first matter, I know the Court has
19 already ruled, as we sit here today, I can tell the
20 court we have not decided our strategy for purposes of
21 mitigation. So for us to have identified the witnesses
22 at this point it would have been impossible.

23 The second, to alleviate the Court's concern that
24 pleadings be provided expeditiously to the parties, I
25 would gladly consent to the order and although I have

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1 not discussed it with Ms. Cook-Reich, I assume she
2 would too, that on the day that any motion is filed by
3 either party, that they have -- that the Court enter an
4 order that they have a duty to serve it upon the other
5 party electronically either by facimile or e-mail. I
6 have tried to do that for most of the pleadings in this
7 case. We -- the federal courts do it routinely. The
8 Ohio Supreme Court does it when there is serious
9 execution date, so I would suggest to the Court that
10 such an order be entered in this case; that when a
11 pleading is filed, it be served upon counsel for the
12 other parties the same day electronically.

13 THE COURT: All right. Do you have any objection?
14 I don't know that we need that order. I think that
15 counsel has indicated that they are abiding by that and
16 everyone has agreed to that and if there would be an
17 issue, I don't know that I need to formally enter that
18 as an order, but I think that we can all agree here as
19 a matter of procedure and as a matter of professional
20 courtesy going forward, given the time considerations
21 that are involved that we would follow that procedure.

22 MR. OSTER: The other thing I would say, Your
23 Honor, to that is, I think that's fine, I don't think
24 we need an order with that. The other thing is some of
25 the documents we're sending over or that we have

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1 attached to scan them through and everything else, they
2 are very old from 1970. I would prefer not to put them
3 in a lot of electronic documents to make electronic
4 copies at all times if I don't have to, if I can make a
5 regular copy, scan it through. I think we will do
6 it -- I don't know that we need a per se order. We
7 obviously have tried to give the defense everything in
8 a very timely manner and contact them on the day to
9 make sure it is being handled. I think we're okay
10 without that order and we will try to get it to them
11 one way or the other.

12 THE COURT: I think the record is clear and I
13 think counsel understands my concern simply that we not
14 have a lot of lag time by snail mail if unnecessary,
15 that we utilize the technology available so that we
16 don't have those types of issues. All right. I think
17 that is the state of things. I am not going to order
18 any sanctions at this time. I don't think that it is
19 called for on the state of the record that is before
20 the Court at this time, but obviously the Court is
21 aware that I would have a continuing duty to police
22 discovery, and hopefully we won't have any problems
23 going forward, but if there are, bring them to my
24 attention and we will do our best to address them in a
25 timely fashion.

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1 All right. If there is nothing further on that, I
2 think we next need to discuss the motion in limine
3 regarding the procedure to be followed. And I will
4 give counsel an opportunity to speak to the issue. I
5 have read your written submissions, and I will give you
6 an opportunity to supplement that with any argument
7 that you wish to present here in court. And then I
8 will indicate to you what I propose as the procedure,
9 and seek any input after that as well.

10 So first, from the State regarding your motion, I
11 will indicate that I have read both your original
12 motion, I had given my only copy of it to my magistrate
13 for follow-up, so I had to get a second copy this
14 morning, but I had read it prior to that time and now
15 have another copy of it. I have the defense reply --
16 or memoranda contra, and then the State's reply to that
17 and I have read all of those pleadings. Mr. Oster, Mr.
18 Eichel, do you have anything?

19 MR. EICHEL: Yes, Your Honor, our motion and
20 memoranda basically speak for themselves. I would like
21 to point out that in writing the reply, I was able to
22 find the essence of what I was looking for when I first
23 filed the motion and that is in State vs. Stump, which
24 is 1980 case, it was recently as last year in 2008 was
25 followed in State vs. Hale, so it remains good law. It

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(513) 785-6596

1 basically lays out the idea that in any event the
2 nature and circumstances of the offense are relevant
3 and must be considered in the penalty phase.

4 Practically all guilt phase evidence is relevant
5 to the aggravating circumstance or the nature and
6 circumstances of the offense, or any claim such as
7 anything in mitigation. So the Court has to consider
8 the 1983 case as presented in the trial.

9 In the normal situation, we have the same triers
10 of fact trying both stages of this bifurcated hearing.
11 This is an unusual proceeding because it is a
12 resentencing, but the statute there throws us back to
13 the other statute that says this is what can be
14 considered. And the Supreme Court has been very clear
15 in all of its cases to say that much, if not all, of
16 the evidence admitted at trial is relevant to the
17 considerations of weighing the aggravating circumstance
18 against the mitigating circumstance.

19 How else are you going to find what is mitigating
20 of this crime, the 1983 crime? We are not sentencing
21 for the 1971 murder. That sentencing was done 39 years
22 ago. We are sentencing for the 1983 murder, which was
23 first tried in 1984. The bifurcation of guilt phase
24 and sentencing phase doesn't mean that we ignore the
25 guilt phase when we do the sentencing phase. And I

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(513) 785-6596

1 think that is the essence of what not only the Ohio
2 Supreme Court has said, but the US Supreme Court in the
3 two cases that were cited by the defense memo, which I
4 took a look at after getting the defense memo. And I
5 have set those cases out in my reply memorandum.

6 Woodson vs. North Carolina, 1976, Zant vs.
7 Stephens, 1983, Z-A-N-T vs. Stephens with a P-H.
8 Individualized determination of sentence must not only
9 consider the individual -- the defendant's own
10 individual character and everything about him, but also
11 the circumstances of the offense. The Supreme Court of
12 the United States has said that is the 8th amendment
13 jurisprudence. That is what we consider when we impose
14 a sentence for a capital offense. Thank you.

15 THE COURT: Thank you, Mr. Eichel. Ms. Cook-Reich
16 or Mr. Porter?

17 MS. COOK-REICH: I have something to say and
18 Randall is going to stand up here and talk.

19 THE COURT: That's fine.

20 MS. COOK-REICH: Your Honor, I would just say that
21 the transcript that I ordered immediately upon
22 receiving the motion, as I have been on vacation I got
23 back and got that motion, I took upon myself to order
24 the transcript immediately from the August hearings
25 because both myself and Mr. Porter recalled

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(513) 785-6596

1 specifically the court already ruling on this issue.
2 And we have made reliance upon that ruling and we have
3 attached the transcript pages to our response of
4 pleading. And I believe Ms. Cutter, the court
5 reporter, already sent the full transcript from those
6 two days of hearings to Mr. Oster and Mr. Eichel.

7 We relied upon the Court's statements, pages, I
8 believe, 58 and 59, that are attached as Exhibit A, 59
9 specifically, where the Court read and said to all
10 present in this courtroom, "We don't just blanket allow
11 the State to re-present all evidence that was admitted
12 in the guilt phase. It has to pertain to the
13 aggravating circumstance only and it would be relevant
14 to the aggravating circumstance." And then later down
15 on that same page, the Court says, "I mean, the only
16 evidence is going to be as pertains to aggravating
17 circumstance. And traditionally that entails a
18 resubmission of portions of the evidence from the guilt
19 phase that are relevant to that aggravating
20 circumstance."

21 I would just say that Mr. Porter and I in
22 preparing since that date, August I think it was 28 is
23 that particular hearing, have relied upon the Court's
24 statement and we believe ruling to, I would say,
25 proceed forward. We haven't yet determined our exact

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(513) 785-6596

1 strategy, but we have gone down the road and prepared
2 thus far in looking at witnesses and looking at
3 potential avenues for mitigation based upon the
4 statements that the Court gave us, and so we were kind
5 of surprised when we got the State's motion in middle
6 or late March. We would ask the Court to abide by its
7 ruling also and I am going to let Randall speak to the
8 rest of the motion.

9 THE COURT: Mr. Porter?

10 MR. PORTER: I would begin with a procedural issue
11 and I am not too sure Ohio laws really set out in this.
12 This appears to me to be an issue of what evidence is
13 going to be admissible --

14 THE COURT: I agree that it is an evidentiary --

15 MR. PORTER: -- mitigation phase, and sometimes my
16 comments can appear disrespectful, but this one is not
17 meant to be. I am wondering if this is an
18 admissibility issue --

19 THE COURT: And if so, it has to be voted on by
20 two of the three judges.

21 MR. PORTER: That's correct, Your Honor.

22 THE COURT: You are reading my mind.

23 MR. PORTER: And if so then my initial matter
24 would be to suggest that the Court should reconvene for
25 purposes of considering this issue and if I can step

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(513) 785-6596

1 back even, move back one step even further. whether
2 this is an issue itself for the panel as opposed to
3 yourself, maybe that in itself should be an issue that
4 has been decided or should be decided by the panel.

5 I would then like to address the merits of the
6 motion itself, unless the Court wants me to remain or
7 has any questions about -- I don't want to call it the
8 jurisdictional issue, but the procedural issue --

9 THE COURT: I am listening to what you have to
10 say. I have my own thoughts that I am going share at
11 the conclusion. And I am incorporating what I'm
12 hearing from you as we go. So this is your opportunity
13 to speak to the issue, Mr. Porter.

14 MR. PORTER: I am going to begin by stepping back
15 and looking at the specification in this case. It is
16 truly an unusual specification and I probably didn't
17 elaborate it enough -- or excuse me, we didn't
18 elaborate it enough on our memorandum contra. This is
19 a status offense or status specification. The
20 specification the Court is sentencing on has nothing to
21 do with the 1983 offense. And I take difference with
22 the prosecutor's statement. I think, in fact, since
23 you weigh the aggravator versus the mitigator, that
24 really the sentence in this case will be determined not
25 by the '83 murder, because that has nothing to do with

JILL M. CUTTER, RPR
(513) 785-6596

1 the status aggravator, but instead the '72 conviction.

2 The prosecutor has set out the law, and for once
3 we don't disagree with it. I think you begin with a
4 statute, and I confess to making an error on the
5 memorandum I filed with the Court. What I did was
6 cited to the statute 2929.03 that is now in effect.
7 What I should have done and is gone back, and I don't
8 think there are any differences, but I don't want to
9 say that as a matter of fact, should have referenced
10 the Court to the statute that was in effect at the time
11 of the trial, which would be 1983. I did pull it and
12 didn't put in it.

13 But I think when you look at the statute, because
14 all of the Supreme Court cases, and we don't seem to
15 have a big difference with the prosecution, literally
16 cites to the statute itself. When you look to the
17 statute, the statute only talks in terms of relevant
18 evidence from the trial phase. And when you look at
19 the Ohio Supreme Court cases, all they are doing is
20 defining the term relevancy. I am looking at some of
21 the prosecutor's cases now and all of them talk in the
22 term of relevancy to the aggravator.

23 I am still unclear and these are obviously
24 knowledgeable prosecuting attorneys, what relevance the
25 '83 conviction has to -- I'm sorry, the '83 murder has

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(513) 785-6596

1 to the 1972 conviction. Just citing to, and they pick
2 up -- you look at their quotes and I mean, they are the
3 reliable and accurate quotes and they are saying that
4 we rely upon is that it needs to be relevant to the
5 aggravators or to the single aggravator in this case.
6 And not once have they offered how the '83 murder is
7 relevant to the 1972 conviction. And I am still
8 puzzled by it.

9 I would suggest that and the law is clear on this
10 and we just received the response today and I am
11 certainly not saying it is late. I am just telling you
12 why we didn't have one additional point that I would
13 like to have researched or made is I think the Ohio
14 Supreme Court has been very clear that the facts of the
15 aggravated murder, the 1983 murder in this case, can
16 only be mitigating but they cannot be aggravating.

17 I think the Ohio Supreme Court has been very clear
18 on the procedure that is to be followed in mitigation
19 phase. The prosecutor generally goes first and asks
20 for re-introduction of evidence, and the Court will
21 allow and not allow some depending on the facts of the
22 case, and then it is the defense burden to forward.
23 And the prosecutor is limited in his case in chief in
24 mitigation as to the evidence that is relevant to the
25 sentencing phase. The prosecutor, in his case in chief

JILL M. CUTTER, RPR
(513) 785-6596

1 in mitigation, cannot present evidence of the
2 mitigators, because at that point they have no idea of
3 which mitigators the defendant is going to raise.

4 The burden or the defense case, the defense gets
5 to make the choice of which mitigators, and then the
6 prosecution is -- has the opportunity to rebut any of
7 those mitigators. So, I would suggest to the Court
8 that first it look at -- I'm sorry, I lost my -- is
9 that I would suggest to the Court is that it is too
10 early to determine if this evidence is admissible. The
11 Court should wait and determine whether we are going to
12 argue whether the facts are mitigating or not. And at
13 that point, if that is the argument that is made, then
14 the facts are, in fact, mitigating, then the prosecutor
15 is free to rebut them. I would suggest and I am just
16 suggesting now, with all due respect to the Court, is I
17 don't know what use the Court would have of the facts
18 surrounding the 1983 conviction at this point. It is
19 not relevant to the aggravator. He has already been
20 found guilty of that, unless for some reason we are
21 going to relitigate that and we have assumed from the
22 Court's remarks that, in fact, that is not going to be
23 the opportunity.

24 The prosecutor cited briefly to Woodson, to
25 Lockett, the Court has those cases in front of him. The

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1 only point we are trying to make there and it goes back
2 to Ms. Cook-Reich's point, is that if, in fact, the
3 facts of the '83 conviction are going to come in, then
4 you have to give us -- through the transcript or
5 whatever, then you have to give us the opportunity to
6 relitigate them. And we were clear that is not where
7 these proceedings were going to go. We based our
8 strategy upon that.

9 I can tell the Court without violating the
10 attorney-client privilege or the work product
11 privilege, the Court was nice enough to give us limited
12 funds for a trial phase investigator, and I think other
13 than using him to serve subpoenas for the earlier
14 hearing, we have not used him at all. If the Court is
15 going to go the route that the prosecutor suggests,
16 then we would request the Court to grant a continuance
17 just based upon our preparation, or lack of preparation
18 at this point, we would be unable to proceed if the
19 prosecutor is going to be bringing in all of the trial
20 phase evidence.

21 I would again just point the Court back to the
22 prosecutor's own cases. I have circled the language
23 again and again. I am not going to do that, but
24 certainly the Court still has done it, is they again
25 and again say the evidence needs to be relevant to the

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(513) 785-6596

1 aggravating circumstances. Given the unique nature of
2 the circumstance in this case, I just don't know how it
3 is relevant, if someone would at least tell me so I can
4 respond, I am at a loss. Thank you, Your Honor.

5 THE COURT: All right. Mr. Oster?

6 MR. OSTER: Judge, if I may, Judge.

7 THE COURT: Yes.

8 MR. OSTER: I think and I want to clear this up, I
9 think there is a lot of confusion currently being
10 discussed about what the State is actually asking for.

11 THE COURT: Yeah, I don't think I am confused,
12 but --

13 MR. OSTER: Okay. For the record, I want to make
14 sure, we are not asking through this motion for the
15 admission of that transcript for the mitigation phase.
16 It is not what we are asking for.

17 THE COURT: And I'm not in a position to rule on
18 that as Mr. Porter, I think, accurately pointed out.

19 MR. OSTER: Correct, but I think a lot of these
20 issues as to whether or not it is relevant to 1970 and
21 how is it, the fact of the matter is that transcript is
22 the guilt phase. And our point is that the body, the
23 trier of fact who will eventually find the sentence,
24 has to be acquainted in some fact. There is not a
25 Chinese wall that is drawn between one to the other.

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(513) 785-6596

1 Bifurcated proceedings where we tried to do that were
2 specifically struck down in State ex rel Mason vs.
3 Griffin, I apologize, it's a Supreme Court case. We
4 are just trying to --

5 THE COURT: I think it's Burt Griffin, right?

6 MR. OSTER: Cuyahoga County, correct, Your Honor.

7 THE COURT: Okay.

8 MR. OSTER: But there they tried to have
9 different -- have an insulation between the two. We
10 are just trying to get a procedure so that the
11 three-judge panel can understand it. And the defense
12 has stated and we have no problem with this, they did
13 not want Your Honor to be reading that previously. We
14 come to a point though now where there has to be some
15 familiarity with what happened at that time. We are
16 asking for a procedure as to how to make the three
17 judges aware of that, not for a full admission of that
18 entire transcript. We are not standing here saying the
19 first thing we want to admit in the mitigation phase is
20 that entire transcript. That is not what we are
21 saying. And I want to clear up that confusion because
22 it seems like that is a lot of the overlapping problem.

23 THE COURT: All right. And I have understood
24 that. And I -- Mr. Porter, if you have something to
25 say, go ahead.

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1 MR. PORTER: It looks like the prosecutor wants to
2 have something additional to state and can I defer 'til
3 they get done.

4 THE COURT: Did you have something else, Mr.
5 Eichel?

6 MR. EICHEL: Yes, Your Honor. These aren't my
7 words. These are the words of the Ohio Supreme Court,
8 which were reaffirmed just last year, but in State vs.
9 Stump, the Court said appellant's argument thus assumes
10 that the nature and circumstances of his offense cannot
11 be cited as reasons for or bear no relation to the
12 finding that the aggravating circumstance sufficiently
13 outweighs the mitigating factors. This assumption is
14 erroneous. Revised Code 2929.04 (B) requires the jury,
15 trial court or the three-judge panel to consider and
16 weigh against the aggravating circumstances proved
17 beyond a reasonable doubt the nature and circumstances
18 of the offense. Emphasis added on that later phrase.

19 In a particular case, the nature and circumstances
20 of the offense may have a mitigating impact or they may
21 not, see State vs. Stephan. In either way they must be
22 considered. It's not me saying it. It is the Ohio
23 Supreme Court.

24 THE COURT: It's you saying it, too.

25 MR. EICHEL: Well, I am saying the Supreme Court

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(513) 785-6596

1 has recently as last year in State vs. Hale said that
2 that is good law.

3 THE COURT: All right. I just didn't want the
4 record to appear that there was a third person
5 speaking.

6 MR. OSTER: No ghost prosecutor, even though we
7 are on an older case, Your Honor.

8 THE COURT: Mr. Porter?

9 MR. PORTER: I just have a brief response and my
10 recollection of Hale is it wasn't -- the aggravator
11 wasn't a single status aggravator that was in this
12 case. Again, I think this case is really unique. I
13 hate to use the word really, just because of the nature
14 of the specification. And I am struck by Mr. Oster's
15 last response. And again I mean this respectfully to
16 him, is we don't want -- he is saying we don't want the
17 Court to admit the transcript.

18 THE COURT: They are not asking at this point in
19 time is how I interpreted that.

20 MR. PORTER: And I understand --

21 THE COURT: May or may not.

22 MR. PORTER: And I am understanding that, and I am
23 a bit perplexed because I have never been involved in a
24 proceeding before where the trier of fact gets to go
25 out and consider a transcript or anything that is not

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(513) 785-6596

1 in evidence. I mean, if you are looking for invited
2 error that seems to me to be considering something that
3 is not properly before the Court.

4 THE COURT: Okay. All right. All right. This is
5 my view, and it may take me a moment to get through
6 this. I will explain to you where I am at and where I
7 believe we are going to be as far as the procedure on
8 this after having considered your written submissions
9 and further argument today.

10 First of all, the statements that were quoted back
11 to me from our August hearing, I certainly don't take
12 any issue with what I said then today. I think that
13 what I indicated is accurate, that it reflects the
14 appropriate procedure to be followed in the case. I
15 don't know that it is properly characterized as a
16 ruling that affects this, because I believe I was
17 ruling on a separate motion. But certainly, this Court
18 is aware of the Supreme Court case law that indicates
19 that it has a gatekeeper function to perform in
20 determining the evidence that is admissible at the
21 penalty phase and that to simply, as a blanket
22 statement, allow all evidence from the trial phase to
23 be admitted at the penalty phase, it could potentially
24 be error and I am aware of the cases that say admit it
25 all and let the jury figure out what is relevant, that

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(513) 785-6596

1 that has been found to be error, and certainly that is
2 not the Court's inclination. It is not going to be the
3 procedure that is followed.

4 Were this any other capital case, the same trier
5 of fact at the trial phase, at the conclusion of those
6 proceedings, would then go on to consider the penalty
7 phase. Whether that would be the original three-judge
8 panel in this case, whether that would be any three
9 judge panel hearing any capital case, or any jury
10 hearing any capital case or this 2009 new three-judge
11 panel, all of those fact finders are in a position
12 where they have heard the trial phase evidence, and
13 then the law requires that that fact finder then turn
14 the page to consider the penalty phase and they are
15 given specific instructions on how to proceed in that
16 penalty phase. At the -- and so every fact finder that
17 has ever had to determine whether the aggravating
18 circumstances outweigh the mitigating factors beyond a
19 reasonable doubt has done so within a context. And the
20 context being, the context of the trial of the case
21 that they heard.

22 I can't imagine that any rational being would
23 suggest that a matter of such gravity as this should be
24 decided without a context. I mean, it would be, I
25 think, egregious error to have three judges consider,

JILL M. CUTTER, RPR
(513) 785-6596

1 engage in that weighing process absent a context to be
2 provided. So this is -- and this is how I see this
3 going down is that when we start on Monday morning, May
4 the 11th, we are picking up where, you know, the matter
5 was left off back in 1984. We are heading in to the
6 penalty phase of this trial. At that point in time
7 there will be three judges up here pursuant to the
8 order and there will be some evidentiary issues that
9 are addressed.

10 The State will seek, I imagine, to introduce
11 pertinent portions of the evidence from the trial
12 phase. I don't know what those may be. I don't know
13 how voluminous it may be. I don't know how restricted
14 it may be, but they are going to make that proffer, I
15 assume, of evidence.

16 The defense will object to certain portions, may
17 agree to others, but there is going to be decisions
18 that are going to have to be made by that three-judge
19 panel as to what is admissible and what is not
20 admissible out of that transcript. There is no way
21 that the three judges up here can make that
22 determination without having read the transcript. I
23 mean, there is no way that these judges can determine
24 what would be relevant. To go to the issue that Mr.
25 Porter raised is what is relevant to this aggravating

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(513) 785-6596

1 circumstance, in order to be able to properly make that
2 determination, that three-judge panel would have to
3 have read as background material, as preparatory
4 material, that trial phase transcript so that it has
5 the appropriate context, so that it is similarly
6 situated to the original three-judge panel, or any
7 other three-judge panel that would ever make this type
8 of a decision.

9 That does not by any means suggest that that trial
10 phase transcript will then be considered as evidence in
11 the penalty phase, but it provides the context within
12 which that three-judge panel must make determinations
13 about what is admissible. And then that three judge
14 panel will dutifully only consider the matters that are
15 admitted for purposes of the penalty phase, and those
16 are -- that is going to be according to statute and
17 case law, the matters that are relevant to the weighing
18 process only.

19 Additionally, the instructions that I am familiar
20 with that would be provided to a jury that would be
21 making this determination, I believe the law that would
22 guide a three-judge panel. In addition to the
23 mitigating factors that will ultimately be raised by
24 the defense there is typically a catch all factor that
25 would suggest that the finder of fact needs to consider

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(513) 785-6596

1 any other factor that may be mitigating. I have
2 frequently heard it argued and, in fact, objected to by
3 the State but argued by defense counsel that a
4 mitigating factor can be any relevant factor that you
5 want it to be essentially from a jury.

6 Similarly, the Court, I think, has a duty to
7 review the trial phase transcript of proceedings in
8 this case, has a duty to review that to determine
9 whether it finds any aspect of the nature and
10 circumstances of the offense mitigating. It
11 certainly -- the case law indicates that the aggravated
12 murder itself is not to be considered an aggravating
13 circumstance and the Court is aware of that. We will
14 make sure that the other members of the panel are aware
15 of that. But certainly there is a duty to determine
16 whether there is any mitigation to be weighed in the
17 process within that.

18 So I agree with Mr. Porter that it is to -- it is
19 premature for me to determine the admissibility of
20 evidence at a penalty phase. There is a procedure that
21 is dictated by statute that that is an evidentiary
22 determination to be made during the penalty phase
23 hearing at the commencement of the penalty phase
24 hearing, and since that is during the hearing or during
25 the trial it must be made in accordance with the way

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(513) 785-6596

1 evidentiary issues are resolved during trial, which is
2 by agreement of two out of three of the members of the
3 three-judge panel.

4 There has to be a majority vote yea or nay on
5 admissibility. My proposal and the procedure that I
6 anticipate following, and this is similar to the
7 procedure that this Court followed in the Geldrich case
8 is that I am going to take steps to prepare a penalty
9 phase notebook, so to speak, for myself, for the other
10 members of the three-judge panel, and I will be more
11 than happy to allow counsel to inspect it and review it
12 and address any issues that they may have with it. But
13 it is a notebook to bring the other judges up to speed
14 on where we are in this case.

15 Included in that notebook I propose that we would
16 have the transcript of the trial phase, again, for
17 purposes of background to provide a context so that the
18 judges will know how to rule on what is admissible and
19 what is not admissible, and to otherwise situate that
20 three-judge panel as closely as possible to the
21 original panel, or to any other panel that would ever
22 make this type of a determination. I also would think
23 that a copy of the sentencing statutes that were in
24 effect at the time of trial should be provided in that,
25 so that the judges have the law that is going to govern

JILL M. CUTTER, RPR
(513) 785-6596

1 these proceedings close at hand and available to them.

2 I would also propose that I provide a copy of the
3 -- this Court's rulings during the case on pretrial
4 motions. So that, again, they know what this Court has
5 ruled on pretrial and what they have not, and if any of
6 those were in the form of motions in limine which could
7 be re-raised, they will understand the context in which
8 those have been raised, they will understand what
9 issues have been resolved and have not been resolved,
10 and I would be willing to accept suggestions if there
11 is anything further, but I think that at a minimum,
12 those three things would have to be provided to the
13 Judges in -- prior to the commencement of the penalty
14 phase hearing so that when we start the penalty phase
15 hearing we can address the first matter of business,
16 which is going to be what's admissible in this hearing.
17 So, with that being said, does the State have any
18 additional comments that they wish to offer?

19 MR. EICHEL: We have nothing further, Your Honor.

20 THE COURT: All right. Mr. Porter or Ms.
21 Cook-Reich, do you have any --

22 MR. PORTER: Could we have a moment, please?

23 THE COURT: Sure.

24 MR. PORTER: As we understand the Court's
25 proposal, what we would ask is for -- I am thinking of

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(513) 785-6596

1 my schedule -- next Tuesday to file objections to the
2 Court's proposal?

3 THE COURT: Okay. Yeah, I mean, you can reserve
4 -- yeah, you are reserving until Tuesday to file a
5 written objection?

6 MR. PORTER: Written objections.

7 THE COURT: Okay.

8 MR. PORTER: What the Court has done, and let me
9 elaborate. The Court has suggested what it believes to
10 be the appropriate procedure.

11 THE COURT: Yes.

12 MR. PORTER: None of us have had an opportunity to
13 hear it just prior to the Court announcing it. What I
14 really I am asking for is four or five days just to put
15 the objections before the Court prior to the Court
16 creating the notebook.

17 THE COURT: All right. That is fine. I mean, you
18 can obviously have a right to object now or at any time
19 that you feel is appropriate.

20 MR. PORTER: I think we would like to give some
21 thought as to how we want to make the objections.

22 THE COURT: All right. But, you know, to me, it
23 is -- reading that trial transcript is not a whole lot
24 different than reading the case law as this case is
25 developed. It is, you know, it's part of familiarizing

JILL M. CUTTER, RPR
(513) 785-6596

1 the panel with the procedural posture of this case, and
2 I think it would be utterly irresponsible for this
3 Court to -- not to do that. But yes, I obviously --
4 obviously you have a right to object. I solicited your
5 comments, and you can feel free to write your written
6 objections and I will review those and address them
7 accordingly.

8 But that is -- I have, at the request of counsel
9 and as a courtesy up 'til this date in the proceedings,
10 have not reviewed the transcript of the trial phase.
11 And there have been times when I have felt somewhat at
12 a disadvantage as a result of having not read that, but
13 I've done that, but I think that the law would
14 recognize that just as every three-judge panel in the
15 history of Ohio capital case jurisprudence has heard
16 the trial phase, and then determined what evidence
17 would be admissible at the second phase and only
18 consider that, that's what this three-judge panel will
19 do is be familiar with the trial phase, make
20 determinations as to what portions of that will be
21 considered. I imagine there may be portions of it that
22 would be requested by defense as mitigating issues.
23 There certainly is that possibility. But, you know,
24 but at that point in time we will make those rulings
25 and I know that I will scrupulously honor that

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1 obligation to only consider the evidence that is
2 admitted at the penalty phase and only consider it in
3 the manner provided for by law.

4 All right. So with that being said, is there
5 anything further at this time subject to your further
6 written objections?

7 MS. COOK-REICH: Your Honor, we would also need
8 another date for myself and Mr. Porter to come back on
9 a funding issue. I know that you are gone on, I think,
10 Friday and then you're gone for a week.

11 THE COURT: Yes.

12 MS. COOK-REICH: We can certainly schedule that
13 with the office at a later time, I just want to not
14 leave today without mentioning that to you.

15 THE COURT: All right. Yeah, I, obviously this
16 case is highest priority to me. I am going to tell you
17 that my -- I am -- the Court is unavailable after
18 tomorrow until the 20th, and as I am looking at my
19 calendar now, I am in trials every day leading up to
20 this hearing with the exception of Fridays which are
21 set aside as the Court's criminal docket.

22 I will indicate that on May the 1st I do not have
23 a docket on that day, that is a Friday, there is a 12th
24 District seminar that typically goes until around 2:00
25 in the afternoon, and --

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1 MS. COOK-REICH: We would like to do it as soon
2 as --

3 THE COURT: Sooner than May the 1st? Okay.

4 MS. COOK-REICH: More like the week of the 20th
5 when you come back at some point in time.

6 THE COURT: Well, we could set it towards the end
7 of any of those days, I guess. It looks -- as we
8 speak, I have -- I am going to have jury trials every
9 day. But, you know, what we can do is set it towards
10 the end of the day when I am releasing the jury.

11 MS. COOK-REICH: That will be fine.

12 THE COURT: Is there any --

13 MS. COOK-REICH: Or Mr. Porter indicated he would
14 come early 8:00 in the morning if you wanted to do it
15 before you start your day.

16 THE COURT: I generally have, I mean, I have civil
17 reports that are set on all of those days and I could
18 have my magistrate cover one or more of those if
19 necessary, but if it's all the same, I would just as
20 soon do it towards the end of the day on a given day.

21 MS. COOK-REICH: That's fine.

22 THE COURT: And the State obviously --

23 MS. COOK-REICH: Any day by the 24th.

24 THE COURT: If this follows the procedure that we
25 followed in the past, the State's participation would

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1 only be at the beginning to determine the scope of any
2 hearing, and you know, whether it is appropriate to
3 grant in the context requested. And then after that,
4 you know, we wouldn't need you to be around all that
5 long if indeed I decide to grant request for an
6 ex-parte hearing. So, is there a day around 4:00 --

7 MS. COOK-REICH: Not the 27th or the 28th.

8 THE COURT: Let me finish.

9 MS. COOK-REICH: Sorry.

10 THE COURT: A day around 4:00 the week of the 20th
11 that is better than any others? I would request that
12 it not be the 24th.

13 MR. OSTER: If we, just so Your Honor knows
14 schedules of the prosecutor, if we go on a Thursday or
15 Friday, that is typically not a day Mr. Eichel is here,
16 he has made himself available based on this case to
17 work that around, if need be we can, but our preference
18 is Monday through Friday, but Mr. Eichel has --

19 THE COURT: A Monday through Wednesday, you mean?

20 MR. OSTER: I'm sorry, Monday through Wednesday.

21 THE COURT: Okay.

22 MS. COOK-REICH: I prefer Monday through Friday
23 also, Judge.

24 THE COURT: Right; right. We have gone on
25 Saturday, recently.

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1 MS. COOK-REICH: I have been here on Saturdays.

2 THE COURT: Yes, recently. Okay. On that Monday,
3 Tuesday, Wednesday the 20th, 21st or 22nd, is any --

4 MS. COOK-REICH: Mr. Porter can't do the 22nd.

5 THE COURT: Okay. Any preference between the 20th
6 and 21st?

7 MS. COOK-REICH: None to me.

8 THE COURT: All right. If my schedule continues
9 as it is now, it looks like on the 21st I would likely
10 have a jury deliberating in the afternoon and that
11 would be my preference is to do it then as opposed to
12 on Monday which would be in the midst of the trial. So
13 why don't we say 4:00 on Tuesday, April 21st.

14 MS. COOK-REICH: Thank you, Your Honor.

15 THE COURT: All right. And if there is -- since
16 you would have any proposed objections to the Court's
17 procedure filed, it looks like a week prior to that, we
18 may be in a position where we can address some of those
19 matters also. Now, the next question is do we need Mr.
20 Davis here for the 21st?

21 MR. PORTER: No, I will obtain a waiver from Mr.
22 Davis if that is acceptable to the Court and use the
23 same content of the form that we used for the hearing.

24 THE COURT: Same procedure that you followed for
25 this waiver?

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1 MR. PORTER: Yes.

2 THE COURT: Is the State all right with that?

3 MR. OSTER: Yes, that's fine.

4 THE COURT: Okay. All right. Well then, I will
5 expect we will not -- and Mr. Porter, in reliance on
6 that, we will not be putting a transport order on, so
7 if there is any change, if you find out that Mr. Davis
8 is desirous of being here for that hearing, please
9 contact us at the earliest time possible so that we can
10 get the transport order on, but based on the
11 representation that he would be waiving that, we are
12 not going to put an order on at this time.

13 MS. COOK-REICH: Thank you, Your Honor.

14 MR. OSTER: Your Honor?

15 THE COURT: Yes.

16 MR. OSTER: This may be a bit premature, but for
17 the sake of being a little green for the environment, I
18 have worked with the Court administrator, Mary Swain,
19 our copy of the transcript -- obviously it's the
20 typewriter paper which is very difficult. Mary Swain
21 was gracious enough, she made a copy that is just the
22 trial itself for us which is a lot easier, obviously to
23 run through and make copies, if we get to, obviously,
24 your procedure in making that to be green, we had that
25 available where it may not kill as many trees, we may

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1 be able to use that and be a lot easier than --

2 THE COURT: Okay. I'm not sure I am following
3 what you are saying. I have a copy of the trial phase
4 only in my chambers that I have not read yet. I
5 haven't even looked at the page count. I can note that
6 it appears to be around 2 inches thick, that is as much
7 as I can comment on at this point in time. And I
8 assume that that is what would be copied and provided
9 to the other judges.

10 MR. OSTER: What I am letting the Court know is I
11 have additional copies --

12 THE COURT: Already made?

13 MR. OSTER: Already in my office that Mary Swain
14 provided to me.

15 THE COURT: Now I understand what you are saying.

16 MR. OSTER: So if, and I understand there is going
17 to be objections, if we get to that point, my whole
18 thing, and I tried to preface it in a funny joke, but
19 it failed, of being green, is to try to save some of
20 those papers. If the Court were to decide that after
21 objections and everything else, I worked with Mary
22 Swain and those have been created at this point if they
23 were ever to be utilized.

24 THE COURT: All right.

25 MR. OSTER: We have been utilizing them, they are

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1 not marked up or anything, but --

2 THE COURT: Well, I am sure we will take advantage
3 and try to avoid the senseless slaughter of innocent
4 trees.

5 MR. OSTER: I know the county budget as well, so I
6 am just doing what I can, Your Honor.

7 THE COURT: All right. I understand. Anything
8 further then that we need to take up at this point in
9 time? There was the stay issue. Let me -- where are
10 we at on that?

11 MR. OSTER: It's -- it's --

12 MR. PORTER: Could I confer with the prosecutors
13 on that to see where we are?

14 THE COURT: Sure.

15 (Counsel confer off the record).

16 THE COURT: Yes, Mr. Porter.

17 MR. PORTER: Please the Court, I had an
18 opportunity to discuss with the prosecutor and had an
19 opportunity to discuss it with Ms. Cook, there is
20 somewhat of a lengthy history with respect to the DRC
21 records, the motion for reconsideration was -- and I
22 just putting this out for the record, I know the Court
23 is well versed in the issue -- filed a motion for
24 reconsideration, the Court adopted the position, at
25 least my recollection is that since Mr. Davis, by that

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1 time, or closely thereafter, filed his notice of
2 appeal, the Court didn't have jurisdiction to resolve
3 the issue --

4 THE COURT: Right, because it was subject to the
5 appeal.

6 MR. PORTER: Yes. To resolve the issue, we
7 would -- we have a numbered copy of the records, I was
8 anticipating filing by next Tuesday, with the Court's
9 permission, any objections to the Court's procedural
10 order today, we would file under seal with the Court
11 any of the DRC records we object to and we would
12 turnover to the prosecution the remainder of the DRC
13 records that we don't have any objection to.

14 THE COURT: All right. And then ask me to make a
15 ruling on the sealed records that you object to?

16 MR. PORTER: Yes.

17 THE COURT: All right. Okay. Procedurally so
18 that I understand, there was -- I know there was an
19 original request by the State that I ruled on for an
20 order regarding the DRC records. You had -- I do
21 remember that there was a notice of appeal filed and
22 then you asked me to reconsider that ruling, which I
23 determined I didn't have jurisdiction to do at that
24 time. Since then the appellate issue has been
25 resolved. I believe that in terms of it being found

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1 not to be a final appealable order, not the merits
2 necessarily, but just that it was not a final
3 appealable order, and I thought that subsequent to
4 that, there was a motion for a stay, for lack of a
5 better term, asking me to order the State not to review
6 those records while you prepared, and I forget the
7 terminology you used exactly, but it was a privilege
8 log or something along those lines, I believe is the
9 term you used.

10 MR. PORTER: That would be correct, Your Honor.

11 THE COURT: Yeah, I was not familiar with that
12 terminology myself, but that was my understanding of
13 what you had requested, and then I had never seen the
14 proposed privilege log that was supposed to be
15 forthcoming. And so, no action has been taken to this
16 point. It's my understanding that as of today's date
17 is the state still has not review those records; is
18 that correct?

19 MR. OSTER: No, Your Honor, we have been trying to
20 be as --

21 THE COURT: Patient.

22 MR. OSTER: Yeah, but it's gotten to the point,
23 you know, the Court is well aware of the date in April
24 and --

25 THE COURT: May.

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1 MR. OSTER: May is coming rather soon, we -- you
2 know, I'm not going to harp back on the discovery
3 issue, but we need to get going on this case, and this
4 motion has been pending for a long time and now we are
5 going to have a log, and this Court ruled originally we
6 are entitled to those, we got them from this Court, no
7 appellate court stopped that, the State feels it is our
8 right to look at those records now, and that we have to
9 look at those records for all of the reasons we stated
10 over a year ago --

11 THE COURT: Right.

12 MR. OSTER: -- as to them and I won't rehash any
13 of them.

14 THE COURT: Well --

15 MR. PORTER: Let's be clear what the appellate
16 court ruled, the appellate court did not rule they had
17 any right to look at those records. We filed our
18 motion asked the Court to stay, the Court never ruled
19 on the motion, our motion to -- or to file the
20 privilege log was a little bit premised on the Court
21 ruling on that motion. What we have suggested is, is
22 we will go through the records. We will turn over all
23 but the few, and the records are numbered, all but the
24 few that we think are privileged, we will file them
25 under seal.

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1 THE COURT: All right.

2 MR. PORTER: You know, to sit here and to say that
3 the appellate court has decided that issue, you know,
4 is really a misrepresentation, a blatant
5 misrepresentation. All they decided was that --

6 THE COURT: I sense your passion, Mr. Porter, and
7 I understand the point, and I understand they ruled
8 that it was not a final appealable order, and that is
9 the extent of their ruling. The issue that I have is
10 after having received the motion for a stay, I had
11 engaged in some research based on the merits of your
12 request, which your request seemed to be based on the
13 idea that there was a privilege that was recognized
14 under law that would be protected, and so the Court
15 looked into that issue to see whether an individual who
16 is incarcerated in the state prison system and who has
17 engaged in any type of perhaps counseling or
18 psychological counseling, or things like that, has a
19 recognized privilege, and I can't cite the case because
20 I don't have that in front of me at this time, I could
21 get it. But my understanding is that there is a
22 privilege that is recognized under Ohio law, but to the
23 extent that the mental state of the defendant is then
24 raised in mitigation, that privilege would be deemed
25 waived.

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1 So as we stand, based on the state of the
2 discovery, I don't see that the mental state has been
3 placed in issue by the defense, but I am aware that
4 should that be the case, that that, then, would waive
5 the -- the certain privileges. So, I do think that
6 there is a legal basis for keeping the State under the
7 order for the time being, but I think that we need to
8 resolve the issue of whether the -- what is going to be
9 placed in issue as a part of the penalty phase of the
10 trial quickly.

11 And I think your proposed procedure of Tuesday
12 filing under seal those portions that you object to, I
13 think that I can review that in conjunction with the
14 law that I have already reviewed, the case names escape
15 me as we speak, but the essence of which is what I just
16 communicated, and then make a ruling that would, of
17 course, be then subject to change based on whether
18 mental state becomes a matter of issue.

19 Other privileges, you know, I guess you would have
20 to educate me as to what other privileges, other than,
21 you know, medical privilege would be involved.

22 MS. COOK-REICH: Judge, along those lines that
23 would mean that on Tuesday the portions that we are not
24 asking the Court to rule on under seal we would be
25 providing to the prosecutor. Now, I will say those

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1 probably won't be by fax, or electronic transmission.
2 They will be a hard copy, and we will provide those.

3 THE COURT: Okay. And it is likely what they have
4 in the box that they haven't seen yet.

5 MS. COOK-REICH: Yes, it's the same stuff.

6 THE COURT: So, you could either give them a copy
7 or you could --

8 MS. COOK-REICH: We'd probably give them a copy
9 because we would have taken off particular numbered
10 pages --

11 THE COURT: So they don't have to sort through and
12 figure it out, I got it; I got you.

13 MR. PORTER: And the thought is, that since we've
14 numbered a copy of the pages, what we file under --
15 what we file with the privilege log with the court it
16 would be pages four through six, psychological
17 privilege and we could look, I'm just using an example,
18 please, Your Honor, and then the court could look at
19 those with respect to the privilege and pages eight
20 through nine medical or something.

21 MS. COOK-REICH: They can be re-inserted if you
22 determine that some or all of them are not privileged,
23 they just could get those pages.

24 THE COURT: Yeah, I think that is essentially what
25 we have to do at this point. So those will be issues,

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1 you will evidently know what can be viewed without
2 objection as of close of business Tuesday. And then
3 the portions that remain for my ruling we will
4 determine that on the 21st.

5 MR. OSTER: I would ask then, Your Honor, if I
6 could bring the sealed box down to your chambers to
7 have that with the rest so there is no claim that we
8 did anything and that it be preserved that way in your
9 chambers?

10 THE COURT: Yeah.

11 MS. COOK-REICH: No problem, I would rely upon Mr.
12 Oster's oath as an officer of the Court that he has not
13 looked through that.

14 THE COURT: That's fine. But, you know, I
15 shouldn't be the only one who doesn't have the records.
16 So, yeah, that would be fine, Mr. Oster, why don't you
17 bring those down and then we will make that
18 determination at that time.

19 MR. OSTER: Thank you, Your Honor.

20 MR. PORTER: Just so the procedure is established
21 and I don't create any misstep. My intention to file
22 with you are only the documents that we are claiming
23 are privileged as opposed to all 1,400 pages.

24 THE COURT: Right.

25 MR. OSTER: And then we should expect to get the

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1 unprivileged ones by Wednesday or Thursday at the
2 latest?

3 MS. COOK-REICH: Those will go in the mail,
4 because they are in Randall's office, the numbered --

5 MR. PORTER: I will put them in the mail,
6 overnight them Tuesday which means he will have them on
7 Wednesday.

8 THE COURT: Okay. Fair enough. All right.
9 Anything further then that we need to take up at
10 today's hearing?

11 MR. OSTER: Not on behalf of the State, Your
12 Honor.

13 THE COURT: All right. As soon as we finish here,
14 I'm going to send out the e-mails to the other judges
15 and confirm the availability as I referenced and I will
16 look forward to seeing counsel on April the 21st at
17 4:00 p.m.

18 MR. OSTER: Thank you, Your Honor.

19 MS. COOK-REICH: Thank you, Your Honor.

20

21 - - -

22 PROCEEDINGS CONCLUDED

23 - - -

24

25

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1 STATE OF OHIO)

2) SS. REPORTER'S CERTIFICATE

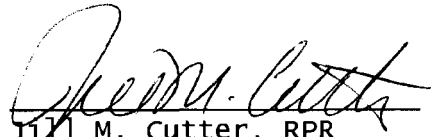
3 COUNTY OF BUTLER)

4 I Jill M. Cutter, RPR, do hereby certify that I am
5 a Registered Professional Reporter and Notary Public within
6 the State of Ohio.

7 I further certify that these proceedings were
8 taken in shorthand by me and by electronic means at the time
9 and place herein set forth and was thereafter reduced to
10 typewritten form, and that the foregoing constitutes a true
11 and accurate transcript, all done to the best of my skill and
12 ability.

13 I further certify that I am not related to any of
14 the parties hereto, nor am I in any way interested in the
15 result of the action hereof.

16 Dated at Hamilton, Ohio, this 8th day of May,
17 2009.

18 
19 Jill M. Cutter, RPR
20 Official Court Reporter
21 Butler County Common Pleas
22 Hamilton, Ohio 45011
23
24
25

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(513) 785-6596

COURT OF COMMON PLEAS

BUTLER COUNTY, OHIO BUTLER CO.
COURT OF APPEALS

FILED 1

2010 JAN -8 10 39

CINDY CARPENTER
BUTLER COUNTY
CLERK OF COURT

JAN 08 2010

STATE OF OHIO,

Plaintiff,

Case No. CR-1983-12-0614

CA-09-10-263

vs.

HONORABLE ANDREW NASTOFF

VON CLARK DAVIS,

Defendant.

ORIGINAL

MOTION HEARING

TRANSCRIPT OF EX-PARTE PROCEEDINGS

APRIL 21, 2009

JILL M. CUTTER, RPR
(513) 785-6596

26

1 COURT OF COMMON PLEAS

2 BUTLER COUNTY, OHIO

3
4 STATE OF OHIO,

5 Plaintiff,

Case No. CR83-12-0614

CA 09-10-263

HONORABLE ANDREW NASTOFF

6 vs.

7
8 VON CLARK DAVIS,

9 Defendant.

ORIGINAL

10
11 FILED BUTLER CO.
COURT OF APPEALS

12 MAY 08 2010

13 CINDY CARPENTER
CLERK OF COURT

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16
17 FINAL STATUS CONFERENCE HEARING

18 TRANSCRIPT OF PROCEEDINGS

19 September 3, 2009

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(513) 785-6596

1 APPEARANCES:

2

3 on behalf of the plaintiff:

4 MICHAEL OSTER, ESQ.
5 DAN EICHEL, ESQ.
6 Assistant Prosecuting Attorneys
315 High Street, 11th Floor
Hamilton, Ohio 45011

7 on behalf of the defendant:

8 MELYNDA COOK-REICH, ESQ.
9 1501 First Avenue
Middletown, Ohio

10 RANDALL PORTER, ESQ.
11 Office of the Ohio Public Defender
250 East Broad Street, Suite 1400
12 Columbus, Ohio 43215

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1 Transcript of Proceedings

2 Morning Session

3 - - - - -

4
5 THE COURT: We are on record in State of Ohio vs.
6 Von Clark Davis. This is CR83-12-0614. The record
7 will reflect that Mr. Davis is present personally. He
8 is accompanied with his counsel, lead counsel Randall
9 Porter, co-counsel Melynda Cook-Reich. Good morning to
10 you.

11:40AM

11 MS. COOK-REICH: Good morning, Your Honor.

12 MS. COOK-REICH: Good morning Your Honor.

13 THE COURT: Also present in court representing the
14 State of Ohio, assistant prosecutors Dan Eichel and
15 Michael Oster. Good morning to you as well.

16 MR. OSTER: Good morning.

17 MR. EICHEL: Good morning.

18 THE COURT: We are here today for what has been
19 termed or what I have captioned for lack of a better
20 term a final status conference. We are scheduled to
21 proceed with the resentencing phase of this case
22 beginning on Tuesday, September the 8th. And we set
23 this matter to, number one, so that I had the peace of
24 mind of knowing for certain that Mr. Davis had, in
25 fact, been transported here in a timely fashion. We

11:40AM

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1 didn't have any surprises in that area come Tuesday.
2 And secondly, to check with counsel on status, any
3 issues that may have arisen or they anticipate arising
4 that we may need to discuss. And then lastly, I wanted
5 to inquire about a few things such as I think now if it
6 hasn't been done before now, certainly now would be the
7 appropriate time perhaps to notify the Court as to
8 which mitigating factors under 2929.04(B) you wish the
9 Court to be focusing on or consider for purposes of the
10 hearing next week. Certainly at least that is the
11 Court's expectation at this point.

11:40AM

12 With that being said, first Mr. Eichel or Mr.
13 Oster, anything from the State that you wanted to
14 address or that you wanted the Court to take up at this
15 hearing or for purposes of this hearing?

16 MR. OSTER: I think the only real request I would
17 ask for the court is if there is a good time tomorrow
18 that I could come down to set up a laptop to make sure
19 it is working. If the Court knows its schedule, I
20 don't. If I request that, just a time for that.

11:40AM

21 The only other thing is we would just say we hope
22 Mr. Porter's father is doing better.

23 THE COURT: The Court similarly expresses those
24 sentiments with regard to your family. I purposely
25 cleared out my courtroom schedule for tomorrow, in

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1 anticipation that I was going to be spending time
2 focusing on this matter. And so the courtroom would be
3 open if either side needs to come in to check
4 technology issues, those kind of things, feel free you
5 will have access to court to be able to do whatever you
6 may need to do to prepare for next week's hearing, so
7 that is fine. Ms. Cook-Reich, Mr. Porter, anything you
8 wanted to take up?

9 MS. COOK-REICH: Your Honor, just to preserve the
10 record, we have a pending motion which I assume is
11 going to wait until we begin session on Monday --
12 Tuesday.

11:40AM

13 THE COURT: The motion in limine regarding the
14 aggravating circumstance?

15 MS. COOK-REICH: Yes, Your Honor.

16 THE COURT: I will indicate that I am in receipt
17 of a motion to expedite the ruling on that. And the
18 Court's feeling on the matter is this: That a motion
19 in limine even in a typical case by its very nature is
20 an anticipatory ruling. It is not final until the
21 matter is raised at trial and ruled on at trial in
22 light of the evidence that is presented at trial. And
23 therefore, is subject to being changed or reversed or
24 otherwise modified based on the context in which the
25 evidence is presented at trial.

11:40AM

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1 In this instance, even more so, any ruling that
2 this Court would make in limine, is subject to being
3 overridden by a two to one vote on an evidentiary
4 ruling when the three-judge panel is set. I think it
5 is a matter that is best left to be addressed Tuesday
6 morning with the three-judge panel. What I can tell
7 you is that I have done my research on the issue. I am
8 going to make sure that both Judge Pater and Judge
9 Spaeth have copies of your motions and any case law
10 that we have found that we think is pertinent to the
11 issue, so that everyone will be aware that that is a
12 pending issue and ready to deal with it at the first
13 opportunity then on Tuesday.

11:40AM

14 As far as the merits of that motion, I understand
15 that you desire to have some indication ahead of time.
16 I imagine every attorney in every trial would want to
17 know ahead of time how the Court was going to rule on
18 evidentiary issues at trial. We all know that it is
19 the nature of trial practice that you know how judges
20 are going to rule when they rule. And we contingency
21 plan and we prepare for plan A's and plan B's and those
22 sorts of things. It's the nature of trial practice. I
23 know both of the defense attorneys in this case are
24 highly skilled, and highly experienced, and will be
25 prepared to proceed based on the ruling.

11:40AM

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1 MS. COOK-REICH: And just so the Court is aware
2 given the extensive nature of the discovery that the
3 prosecutor has presented, there are numerous witnesses
4 although they have only issued subpoenaed for three, we
5 have spaced our witnesses out accordingly, assuming
6 that we may not get to our case on Tuesday so that,
7 bear with us in the event that you rule in our favor,
8 we are not prepared to begin a full frontal assault at
9 that time. Just to give you the heads up.

10 THE COURT: Well, what I will indicate is that I
11 and the other judges based on representations made at
12 earlier hearings have set aside all four days of next
13 week for purposes of this case and this case only. I
14 cancelled my criminal docket for next Thursday so that
15 that would not interfere. So we wanted to make sure
16 that we were focused completely on this case with
17 minimal distractions and that we had allotted
18 appropriate time. So I think that we can certainly be
19 somewhat flexible with scheduling matters within the
20 context of that four-day period of time. Was there
21 anything further that --

22 MS. COOK-REICH: No, Your Honor.

23 THE COURT: All right. The only other thing that
24 I would reference and again for purposes of assisting
25 the Court, typically, at least in this Court's

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1 experience, and in capital cases that this Court has
2 dealt with -- believe me, I am not saying that this is
3 a typical case by my means, nor that any of them are,
4 but in the three prior cases I have had that have gone
5 to trial, at the conclusion of the trial phase, once
6 there has been a finding that would necessitate a
7 second phase or a sentencing phase, typically that
8 falls over a weekend type of time frame where the trial
9 phase ends at the end of the first week and we begin
10 the sentencing phase the second week. Typically at the
11 conclusion of that trial phase, is when the defense
12 notifies the Court which factors that it would be
13 requesting a jury to be instructed on under 2929.04 (B)
14 (1) through (7). Maybe your answer is that all of them
15 are at issue. I'm not sure, but if you can provide any
16 guidance to the Court, I think that that would be
17 appropriate at this time, unless you object to
18 proceeding in that way and if so, you can state that
19 for the record and your reason for that.

11:40AM

20 MR. PORTER: It's my position what few trials I
21 still do as opposed to appellate work, always ask the
22 Court to only instruct on (B)(7). We will tell you
23 this morning (B)(7) is the only factor we will be
24 pursuing under.

11:40AM

25 THE COURT: Okay. All right. And (B)(7) is the

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1 -- so that would include by my interpretation the body
2 of (B) plus (7) which is any other factors that are
3 relevant to the issue of whether the offender should
4 she sentenced to death. The body would include
5 history, character, background of the offender, nature
6 and circumstances of the offense to the extent that
7 they are mitigating only. And the aggravating
8 circumstances proven beyond a reasonable doubt.

9 MR. PORTER: I'm sorry, what was the Court's last
10 statement, Your Honor, about the aggravating
11 circumstances?

11:40AM

12 THE COURT: And the aggravating circumstance that
13 has been proved beyond a reasonable doubt.

14 MS. COOK-REICH: Okay. Yes. I didn't know if the
15 Court said aggravating circumstances as opposed
16 aggravating circumstance.

17 THE COURT: I am aware that in this case there is
18 one. It is the (A)(5) provision. And I am familiar
19 with that as will the other judges at that time.

20 MR. PORTER: Thank you, Your Honor.

11:40AM

21 THE COURT: Anything further that we need to take
22 UP at this time? All right. What I would suggest is
23 one thing I will note is last time we were here, back
24 in May, Judge Pater had requested that we start a
25 little bit later on the Tuesday because he had a

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1 docket. I am not sure if that is his request this
2 time. But what I think might be appropriate is just on
3 the side of caution, why don't we set a 10:00 start
4 date on Monday, we can have Mr. Davis brought over --
5 pardon me, on Tuesday, yes. Monday being Labor Day.
6 On Tuesday. You can have Mr. Davis brought over
7 earlier than that, 9:00, 9:30, whatever your request
8 would be if you need time with him before we begin.
9 And then we would begin obviously with discussion of
10 the motion in limine that is pending, which would be
11 brought up in the context of the State indicating I
12 believe what evidence it's going to be offering in the
13 case. We would entertain, then proceed and entertain
14 any opening statements if you are going to make them.
15 Sometimes they are waived at this point, sometimes they
16 are made, and that will be entirely up to you. And so
17 I don't know -- and then I'm not sure where we are
18 going to be at that point, but we will just proceed if
19 there is any evidence to be taken further that day from
20 the State, we will proceed. And it is my understanding
21 that your first witnesses wouldn't be available until
22 the earliest on Wednesday; is that correct?

11:40AM

11:40AM

23 MS. COOK-REICH: We have some that are coming on
24 Tuesday. I just didn't have a plethora of people
25 coming on Tuesday.

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1 THE COURT: Fair enough. Fair enough.

2 MR. OSTER: We would ask, we have witnesses coming
3 in for Tuesday as well. I guess scheduling-wise would
4 it be wise not to ask them to come until 1:00 at that
5 point then with openings and the initial argument
6 about --

7 THE COURT: I would have somebody available
8 earlier than that just in the event that we move
9 through those early proceedings fairly quickly. Have
10 someone available and then if we need to take a short
11 break while you get together anybody else, again, we
12 can be flexible on that.

13 MR. OSTER: Thank you, Your Honor.

14 MR. PORTER: I think one issue that will arise on
15 Tuesday, with the benefit of the Court's remarks today,
16 is because this is such an unusual case, at least I
17 have never been in this posture before, Your Honor, is
18 if the -- and I'm not trying to play semantics, so no
19 offense meant to the Court, is if the three-judge panel
20 decides its going to accept testimony with respect to
21 the aggravating circumstance, either in the form of
22 live witnesses or I believe the Court suggested that
23 the prosecutor may want to admit or readmit, and I
24 don't know what the correct verb is with respect to
25 some of the testimony from the trial phase, is --

11:40AM

11:40AM

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1 THE COURT: Obviously only that which would be
2 relevant to the aggravating circumstance itself.

3 MR. PORTER: I understand that and assuming -- and
4 I don't want to concede the issue, please, Your Honor,
5 assuming the Court is going to admit either some
6 testimony or some transcript, is that going to be
7 treated as part of the trial phase or is that going to
8 be treated as part of the mitigation phase, which
9 raises an issue only for me logistically, I sometimes
10 get stuck on logistics, is the mitigation opening going
11 to go before that or is it going to go after that? If
12 the Court understands the quandary that at least I am
13 personally in.

11:40AM

14 THE COURT: I think I understand. What I can tell
15 you is that everything we are doing next week is
16 sentencing phase. The trial phase in this case was
17 completed quite some time ago. And so everything that
18 we are doing is relevant solely to the sentencing
19 phase, or the resentencing in this case, phase of the
20 case. And what I anticipate as far as the way we
21 proceed is that we would deal with, for lack of a
22 better term, housekeeping type matters prior to hearing
23 opening statements in the case. So, if we -- if it is
24 a matter if the State indicates that they want to offer
25 some -- reoffer some evidence from the trial or some

11:40AM

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1 exhibits from that, we can entertain their offer, your
2 objection, if any, hear arguments on that, and kind of
3 sort through those housekeeping matters to determine
4 essentially what portions from the trial would be
5 readmitted as part of the sentencing phase. We will
6 make those determinations prior to an opening
7 statement, but obviously the opening statement would
8 precede the actual admission of any evidence.

9 MR. PORTER: Thank you, Your Honor. That does
10 help with that clarification.

11:40AM

11 MS. COOK-REICH: Judge, can I have two minutes to
12 talk to Mr. Porter about something?

13 THE COURT: Yes.

14 (A brief recess was taken at this time.)

15 THE COURT: Go ahead. We're back on record in
16 State of Ohio vs. Von Clark Davis. All parties present
17 prior to us going off record are again present. We
18 just took a short break for counsel to confer on an
19 additional matter. Is there anything else we need to
20 take up?

11:40AM

21 MS. COOK-REICH: There is, Your Honor. We have
22 three out-of-county witnesses that are coming and we
23 have -- my office has issued two checks for two
24 out-of-county persons and we have a third one that is
25 coming from out of state.

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1 THE COURT: That was the subject of the
2 application?

3 MS. COOK-REICH: The application for the Maryland
4 witness. And I can say that given the state of
5 reimbursement by the County, I am not in a position to
6 write that third check nor -- it's come to my attention
7 that I am to ask for immediate appropriation for the
8 funds that I have already issued for the two
9 out-of-county checks and I don't have those numbers
10 here because I have been in here today. And I can
11 certainly get those for you in five minutes if I can
12 contact my secretary she can give you the numbers. The
13 third check that should be written for the witness in
14 Maryland, we are going to ask the Court for immediate
15 appropriation of those funds. Seems quite difficult to
16 get as of Thursday and I need them to send to him to
17 Maryland according to Mr. Porter.

11:40AM

18 THE COURT: I mean, is this additional funds above
19 and beyond what is previously been authorized in toto
20 to counsel? Is this within the framework that was
21 originally issued, but perhaps needs to be adjusted
22 from unused funds for an investigator but could be used
23 for a witness now? Or are you --

11:40AM

24 MR. PORTER: We understood the Court's prior
25 allotment. Just a clarification, was to bring

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1 witnesses from out of the country. The difficult
2 situation we have in this case is three of the
3 witnesses are from out of the county. The Court is
4 certainly more aware of the criminal rules than I am,
5 which is the subpoena is not valid --

6 THE COURT: Unless it is tendered with the
7 milage --

8 MR. PORTER: -- tendered with the miles, so we
9 aren't talking about a hotel or anything like that. We
10 are just talking about miles. The first time around we
11 did not have the out of state to the two witnesses out
12 of county. I had proffered my own personal checks. I
13 am not in the position to do that at this time. We
14 probably cover and we are guessing is what we have left
15 I don't have the figures in front of me, is probably
16 have with what the Court is allotted and have money
17 left to cover the two in state, out of county. And
18 what we don't have left is the miles and the witness
19 fee for the witness from Montgomery County, Maryland.

11:41AM

20 THE COURT: And do you have an estimate of what
21 that milage reimbursement would be?

11:41AM

22 MR. PORTER: Ms. Cook-Reich's office does.

23 MS. COOK-REICH: I am trying to text my secretary
24 now to get those figures.

25 MR. PAGAN: About \$550.

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1 THE COURT: All right.

2 MR. PORTER: Well, and that is again, we aren't
3 trying to run up fees with the Court. I just look at
4 the criminal rule and if we don't issue a valid
5 subpoena, they don't appear. Some judges would bang
6 the gavel and say move on Mr. Porter, you couldn't
7 issue a valid subpoena.

8 THE COURT: Does the State wish to be heard on
9 this matter?

10 MR. OSTER: No, Your Honor.

11:41AM

11 MR. EICHEL: No.

12 THE COURT: All right. We will authorize the
13 funds in order to issue a valid subpoena to the witness
14 from Maryland. We have previously issued an order to
15 that court identifying that person as a material
16 witness. And the rules require that mileage be prepaid
17 in order for any subpoena to be valid, so the Court
18 will authorize those funds to insure that any such
19 subpoena is valid. I understand what you say about not
20 wanting to drive up costs. It's a situation where
21 we're not going to make penny wise, pound foolish
22 decisions. If this is a witness that needs to be here
23 and that is what the rules require, then we will
24 approve that.

11:41AM

25 MS. COOK-REICH: I have an exact figure, Your

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1 Honor, for Mr. Flowers from Maryland, apparently the
2 mileage one way is \$560.45.

3 THE COURT: All right. Prepare an entry.
4 Anything further we need to take up?

5 MR. PORTER: No, Your Honor.

6 THE COURT: That will be the order. What time
7 would you like Mr. Davis here Tuesday morning, assuming
8 that we are going to get underway at 10:00?

9 MS. COOK-REICH: 9:30, Your Honor.

10 THE COURT: 9:30 it is. Joe, can you assure, make
11 sure that you contact the jail and let them know that
12 Mr. Davis needs to be here at 9:30.

11:41AM

13 If there is nothing further, then, we will see
14 everyone here Tuesday morning. We will be in recess on
15 this matter until that time. And if anything does
16 arise over the weekend of an emergency nature, please
17 make sure that counsel for each side has access to my
18 cell phone number so that you can make contact if need
19 be. Actually, I think it would be better to contact my
20 judicial assistant so that there is no ex-parte.

11:41AM

21 Contact my judicial assistant if there is any
22 administrative emergencies that come up or anything
23 like that. Hopefully, we won't have anything, but I am
24 familiar with what happened last time, so just to be
25 sure, make sure you have that. Anything else?

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1 MS. COOK-REICH: No, Your Honor.

2 THE COURT: We are in recess.

3 (Proceedings concluded at this time.)

4 THE COURT: Let's go back on record one more time.

5 We are again on record in State of Ohio vs. Van
6 Clark Davis. All parties and counsel present prior to
7 our last break are again present. Counsel for the
8 defendant wanted to be heard on an additional matter
9 before we adjourned for the day.

10 MS. COOK-REICH: The same matter in regards to the
11 check for this out of state witness. I will bring you
12 an entry and I assume that it would normally have to go
13 through the normal process of up to the clerk's and
14 over to the auditors. I don't envision that is going
15 to be get paid by the auditors given what I know as to
16 their current state of funds. They are not paying
17 attorney fee apps.

11:41AM

18 THE COURT: Well, what I can indicate to you, is
19 that if need be, it can be reimbursed along with any
20 fee app that is submitted if that needs to occur in
21 order to expedite. If you need to walk something
22 through, you can do that, but --

11:41AM

23 MS. COOK-REICH: Normally I would submit them with
24 my fee app, and I guess the reason why we were asking
25 for it today is because I, myself, have fee

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1 applications out for months and they have not been paid
2 and it is very typical that it would be about five
3 months before I ever get this.

4 THE COURT: I understand.

5 MS. COOK-REICH: In the event the auditor's office
6 doesn't honor your order, would you like me to come
7 back?

8 THE COURT: Sounds like something that we need to
9 probably address, so contact the Court if that arises.

10 We will be in recess on this matter.

11:41AM

11 (Proceedings concluded at this time.)
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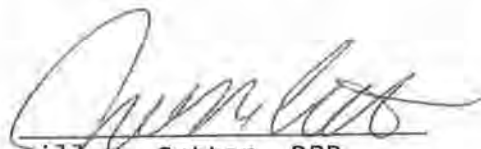
1 STATE OF OHIO)
2) SS. REPORTER'S CERTIFICATE
3 COUNTY OF BUTLER)

4 I Jill M. Cutter, RPR, do hereby certify that I am
5 a Registered Professional Reporter and Notary Public within
6 the State of Ohio.

7 I further certify that these proceedings were
8 taken in shorthand by me and by electronic means at the time
9 and place herein set forth and was thereafter reduced to
10 typewritten form, and that the foregoing constitutes a true
11 and accurate transcript, all done to the best of my skill and
12 ability.

13 I further certify that I am not related to any of
14 the parties hereto, nor am I in any way interested in the
15 result of the action hereof.

16 Dated at Hamilton, Ohio, this 22 day of December,
17 2008.

18 
19 Jill M. Cutter, RPR
20 Official Court Reporter
21 Butler County Common Pleas
22 Hamilton, Ohio 45011
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JILL M. CUTTER, RPR
(513) 785-6596